

CRIMINAL LAW

Text, Cases, and Materials

SIXTH EDITION

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OXFORD
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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Third edition 2008

Fourth edition 2010

Fifth edition 2012

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2013954623

ISBN 978-0-19-870227-6

Printed in Great Britain by
Ashford Colour Press Ltd, Gosport, Hampshire

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AN INTRODUCTION TO CRIMINAL LAW

CENTRAL ISSUES

1. It is extremely difficult to answer the question: 'what is a crime?' An important distinction is drawn between the criminal law, where the aim of the court is to punish the wrongdoing of the defendant, and the civil law, where the aim of the court is to compensate the victim for injuries wrongfully caused by the defendant.
2. There are certain principles which are generally thought to underpin the criminal law. These include the principle of legality (that crimes should be clearly defined), the principle of responsibility (that a person should only be guilty if they are to be blamed for their actions), the principle of minimum criminalization (that the criminal law should be used only where absolutely necessary), the principle of proportionality (that the sentence given for an offence should reflect its seriousness), and the principle of fair labelling (that the description of the offence should accurately describe the wrong involved).
3. The criminal law is made up of a mixture of statutes and common law principles. Some people believe that the law would be in a better state if the criminal law was put into a single Criminal Code. However, others think that this would make the law too inflexible.
4. There has been much debate about how the government should decide which acts are criminal. A popular approach is to say that the criminal law should only be concerned with acts which cause other people harm.
5. There is extensive dispute between criminal lawyers on how to determine the extent to which a defendant can be blamed for his or her actions.
6. Criminal lawyers tend to focus on the definitions of criminal offences. In practice, the procedures that lead to a person facing a criminal court are also extremely important.
7. The Human Rights Act 1998 now plays a central role in several parts of the criminal law.
8. Feminist and critical scholars have done much to challenge some of the unspoken assumptions that underlie the criminal law.

1 WHAT IS A CRIME?

You probably think you know what crimes are: murder, rape, theft, and so forth. But is it possible to define a crime? A wide range of conduct can be the basis for criminal offences. Everything from murder to shoplifting; from pollution offences to speeding. Can a definition of ‘a crime’ be found which includes all these offences?

As the following extract demonstrates, the answer to the question ‘what is a crime?’ depends on your perspective:¹

L. Farmer, ‘Definitions of Crime’ in P. Cane and J. Conaghan (eds) *The Oxford Companion to Law* (Oxford: OUP, 2008), 263–4

There is no simple and universally accepted definition of crime in the modern criminal law, a feature that probably reflects the large and diverse range of behaviours that have been criminalized by the modern state. It is now widely accepted that crime is a category created by law—that is, a law that most actions are only criminal because there is a law that declares them to be so—so this must be the starting point for any definition.

Most modern definitions of crime fall into two main categories, the moral and the procedural. Moral definitions of crime are based on the claim that there is (or should be) some intrinsic quality that is shared by all acts criminalized by the state. This quality was originally sought in the acts themselves—that all crimes were in an important sense moral wrongs, or *mala in se*—and that the law merely recognized this wrongful quality. The weakness of this approach was that it could extend to certain actions which seemed morally neutral (often referred to as *mala prohibita*), such as speeding or failing to register the birth of a child, which have been made crimes by statute. Accordingly, it is argued crimes are such because criminal law recognizes public wrongs as violations of rights or duties owed to the whole community, that is, that the wrong is seen as the breach of the duty owed to the community to respect the law. This definition covers a broader range of offences, as well as recognizing the sociological fact that many acts are criminal only by virtue of being declared so by the law. The strength of this type of definition is less a description of the object of the criminal law, than as an account of the principles which should limit the proper scope of the criminal law.

Procedural definitions, by contrast, define crimes as those acts which might be prosecuted or punished under criminal procedure. The most influential definition of this type was produced by legal theorist, Glanville Williams, in 1955. He sought a purely formal definition of crime. For him, a crime is

an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal.

This is undeniably circular (something is criminal if it is criminal), and seems to avoid definition of the term ‘criminal’ and so might appear to be of little use. However, it arguably reflects more accurately the reality of the modern criminal law, where the scope of the law has extended to include large numbers of regulatory offences tried under criminal proceedings, the content of which go far beyond conduct which can easily be regarded as moral or even public wrongs.

¹ Lacey (1998a). For the benefits of considering the law from different perspectives, see Lacey (2001c) on history, Nelken (1987) on economics, Ainsworth (2000) on psychology, and Fletcher (2001) on philosophy.

However, given the diverse range of sanctions and procedures which can be adopted, from forms of treatment or reparation to mediation or restorative justice, it is not obvious that this definition alone can help to determine what is or is not a criminal proceeding.

As this extract suggests, whether a particular kind of conduct should be regarded as criminal can change over time as a response to political and social factors and depends on where in the world you live. For example, the legal response to homosexual sexual activity² has changed over the decades in response to a variety of social, political, and legal influences.

The definition of a crime comes into focus when it is necessary to distinguish crimes from civil wrongs. If you hit someone you may be prosecuted for the criminal offence of assault and receive a fine. You may also be sued by the victim for damages in the civil law of tort. Both proceedings in a sense result in the same outcome for the defendant: a loss of money; but these legal proceedings have crucial differences. It is the censure and punishment that are attached to a criminal conviction which can explain the difference between civil and criminal proceedings.³ A fine carries with it moral blame, while an award of damages may signify that a person is responsible for the loss, but not carry the sense of condemnation that a criminal sanction does. This has led Andrew von Hirsch and others to suggest that it is the censure that attaches to a criminal penalty which most clearly distinguishes criminal wrongs from other legal wrongs.⁴ Not everyone is convinced by this argument. It is, for example, possible to award punitive damages in civil proceedings if the court regards the tort or breach of contract as a particularly blameworthy one. A different explanation of the difference between civil and criminal proceedings is provided by Andrew Simester, John Spencer, Bob Sullivan, and Graham Virgo:

Assault involves an interference with fundamental rights of the victim, rights which the State is perceived to have a duty to protect. By contrast, individuals are normally able to protect themselves against breach of contract, and can satisfactorily undo any damage suffered with the aid of the civil law.⁵

They, therefore, argue that the state intervenes with the criminal law to protect citizens when people are unable to protect themselves or receive adequate compensation through the civil courts.

In the following passage, Lucia Zedner warns against defining crimes simply in terms of the official legal response.⁶ She starts by setting out the official legal classifications of what crimes are, before challenging them:

L. Zedner, *Criminal Justice* (Oxford: OUP, 2005), 58–63

Thinking about crime as a legal category poses problems for students of criminal justice. It tends to downplay the contingency of crime and, by imposing fixed definitions, to deny its

² Lesbian sexual behaviour has not been the subject of specific prohibition under the criminal law.

³ G. Williams (1955). ⁴ von Hirsch (1993: 9–12).

⁵ Simester, Spencer, Sullivan, and Virgo (2013: 2).

⁶ See J. Edwards (2011) who is concerned that too often the government does not make it clear why something has been made criminal.

open and contested nature. Understanding the central components of the legal classification of crime is indispensable but it is also fraught with difficulties.

First, central to the legal classification of crime is its public quality. A wrong that arises primarily in respect of the rights and duties owed only to individuals is the subject of civil law, whether as a tort, a breach of contract or trust and property rights. A crime is differentiable by the fact that the wrong is deemed to offend against duties owed to society. Just to complicate matters, the same conduct (or inaction) may be both a civil and a criminal wrong; in which case proceedings may generally be taken in both civil and criminal court simultaneously. For example, an assault is potentially both a tort and a crime, and a deception may entail a tort, a breach of contract or trust or be treated as a crime. Given this overlap it is important to identify the differences that determine whether civil or criminal liability, or both, arise. The liability of the civil wrongdoer is based principally upon the loss he or she has occasioned, whereas the criminal wrong resides, in principle at least, in the voluntary action of the perpetrator, their culpability, and the harm caused. And whereas in civil law proceedings are generally brought by the injured party in order to secure compensation or restitution, it is generally the state that prosecutes and punishes crime. A serious problem with the legal classification of crime as public wrong is that it is uninformative: a crime is that which is legally designated as criminal. But the classification does not tell us how, why, or to what end that legal designation has arisen. It cannot explain why some forms of deviance attract the response of the law and not others. It does not explain what determines whether that response is criminal, or civil, or both.

A second facet of the legal classification of crime is that every crime must be so designated by statute or case law and its component parts clearly specified. Every crime consists of a conduct element and, unless it is a crime of strict liability, an accompanying mental element. The conduct element specifies the act or conduct, omission, consequence, or state of affairs that is the substance of the offence. The mental element specifies the state of mind that the prosecution must prove the defendant had at the time of committing the offence. Both must be set down in law to define an offence and both must be proven in order to secure a conviction. For lawyers, this definition has some important attractions. It honours the principle that there be no crime without law and that liability arises only in respect of actions or omissions already proscribed by law as criminal. This principle allows people to go about their daily business free from fear of arbitrary punishment. It gives fair warning to those who choose to offend against the law that they may expect punishment to ensue. It respects the presumption of innocence by making it improper to speak of someone as a criminal until all aspects of liability for a crime have been proven in a court of law. If it is right to refer to suspects, not offenders, in the pre-trial process, then it must be right also to talk only of alleged crimes and alleged victims until the case has been proven in court.

As a substantive definition of crime, however, legal classification is problematic. Although it specifies the structural conditions (principally the mental and conduct elements) that must be met before a court of law will convict, it provides little purchase on the social phenomenon that is crime. To say both that criminal law responds to crime and that crime is defined by the criminal law creates an unfortunate circularity. Taken at face value, it suggests that without criminal law there can be no crime or even that the criminal law, in some bizarre sense, is the formal cause of crime.

A third aspect is that legal ideology makes certain claims as to the objectivity and political neutrality of legal doctrine and the autonomy of legal reasoning by which judgment is reached. Critical scrutiny of the criminal law allows the student of criminal justice to understand that doctrinal framework and the larger values and political factors that underlie it. For example, attention to the centrality of the mental element in the general part of the criminal law attests to its importance as a mechanism for assigning responsibility. But legal ideology

can be problematic too. The proclaimed authority of the judgment and bringing in of the guilty verdict are brutal techniques for imposing order on social strife or messy disputes in which attribution of blame is often far less clear-cut than the law pretends.

A fourth aspect of legal classification is the requirement that crime be subject to a distinctive set of procedures. The rules of evidence, the standard of proof, the requirement that crime be adjudicated in a designated forum, subject to its own procedural rules, and staffed by its own personnel, are all intrinsic to the legal definition of crime. The requirement of proof beyond all reasonable doubt, the principle of morality, and the rules and conventions of the adversarial system combine with the legal institutions of the magistracy, judiciary, and lay jury as distinctive features of the criminal process. Understood this way, crime can be defined as that which is the subject of the criminal process: without prosecution and conviction, no liability for crime can be said to have occurred. The chief problem with this approach is that it is doubtful whether defining crime by reference to laws of evidence and procedure takes one much further.

For the student of criminal justice, the larger problem lies less in the elements so far discussed than the fact that most criminal law scholarship does not address the ways in which law is in practice applied by police, prosecutors, defence lawyers, magistrates, and judges. A simple application of legal definitions misses important variations in social attitudes and moral judgments that determine how those definitions are in practice imposed. And it cannot account for disparities in the application of the law according to the age, sex, class, and race of the supposed perpetrator.

To think about crime, as some criminal law textbooks still do, as comprising discrete, autonomous legal categories remote from the social world, is to engage in an absorbing but esoteric intellectual activity. The exercise of the law is not an arcane clerical task of filing different behaviours in discrete and precisely labelled boxes to achieve nothing more than a semblance of order. Of course, conceptual clarification and normative critique are essential elements of criminal law. Criminal law must define crimes clearly and crimes so defined should be worthy of their label. But the emphasis given by some textbooks to the legal requirements of mental and conduct elements is at odds with the practice of the criminal law, where these concepts play a more marginal role. To illustrate, students of criminal law typically begin their studies by minute examination of the intricacies of the mental elements of crime. They are less often asked to begin by reflecting upon the fact that the great bulk of the 8,000 offences in English criminal law are crimes of strict liability and, as such, require no intention. The sheer number of offences of strict liability raises doubts about the centrality of intention to criminal liability and about the centrality of individual responsibility. It might even be said to place in question what the criminal law is for. With respect to offences of strict liability at least, it is difficult to sustain the notion that crime is principally defined by culpable wrongdoing.

The misapprehension that practising lawyers devote their energies to tortured discussion about the degree of certainty needed to infer or find intention from evidence of foresight would similarly be dispelled by observation of the caseload and working patterns of magistrates' courts where intention is rarely at issue. Likewise, although university courses generally focus on serious offences such as murder, manslaughter, assault, and rape, in practice petty property, public order, and driving offences are the staple work of the lower courts. It is not surprising that generations of students of criminal law are misled into thinking that serious offences and jury trials are the norm, and that sentences of imprisonment are common punishment. Attention to the statistics of recorded crime; to the proportion of cases going to magistrates' and Crown courts; and to patterns of punishment quickly reveals another truth.

Most importantly, for a criminologist to accept that crime is that which is defined by law would lead to some perverse results. To proceed from the idea that crime exists only in law and only insofar as it has been proven in a court of law would excise from criminology a good part of

its present subject matter, scope, and interest. By this definition there could be no dark figure of unrecorded crime since, legally, it is not crime at all. It would also require that the *British Crime Survey* be renamed the British Survey of Alleged Crime and its respondents called not victims but claimants. Official criminal statistics, on the other hand, would enjoy a perfect fit with crime. For by definition only those acts and omissions proven to satisfy the legal requirements of crime before a court of law and recorded as such would count as crime. Studies of attrition rates would also need to be re-conceptualized. There could be no gap between the commission and reporting of crime, nor between reporting of crime and recording by police, and no failure of clear-up rates either. Likewise there could be no offenders other than those convicted, nor any victim whose offender has not been so convicted. In sum, the possibility of hidden crime, of unreported crime, of unsolved crime, or of unknown or undisclosed victims would evaporate and much criminological endeavour with it.

This emphatically doctrinal account of criminal law is diminishing as legal and criminological scholarship converge. Criminal lawyers have fruitfully extended their scrutiny to the social world in which the laws they study are constructed, applied, and enforced. And criminologists reflect more and more upon the legal categorization of activities as criminal: to ask not only why people offend, but also why this behaviour, but not that, is legally designated criminal. If, as is currently the case in England, the study of criminal justice increasingly takes place within law schools, then a conception of crime that speaks little to its legally trained students must be undesirable. But convergence is not union and criminal justice scholars sitting at the margins of the two disciplines have to hold two different definitions of crime, the criminological and the legal, simultaneously in play. Those reading their work had better be quite clear which meaning they employ on each occasion. The crime that is the verdict of a jury persuaded beyond all reasonable doubt of the guilt of the offender is, of necessity, a different phenomenon from the crime concealed in the dark field that has yet to face the bright light of the legal process.

FURTHER READING

- Finkelstein, C. (2000) 'Positivism and the Notion of an Offense' *California Law Review* 88: 335.
- Husak, D. (2002) 'Limitations on Criminalization and the General Part of the Criminal Law' in S. Shute and A. Simister (eds) *Criminal Law Theory* (Oxford: OUP).
- Lamond, G. (2007) 'What is a Crime?' *Oxford Journal of Legal Studies* 27: 609.
- Williams, G. (1955) 'The Definition of Crime' *Current Legal Problems* 107.

2 THE ROLE OF CRIMINAL LAW

What should the aim of the criminal law be?

The American Model Penal Code, section 1.02

- (1) The general purposes of the provisions governing the definition of offenses are:
- (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;

- (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
- (c) to safeguard conduct that is without fault from condemnation as criminal;
- (d) to give fair warning of the nature of the conduct declared to constitute an offense;
- (e) to differentiate on reasonable grounds between serious and minor offenses.

Of course, not everyone will agree with all of these. Even if they are accepted, these principles will often conflict, and where they do there will be disagreement over how they should be balanced.⁷ Take the example of bullying. This is behaviour which clearly falls within (a) as conduct which harms another. But there is great difficulty in defining precisely what bullying is as is required by (d). The law must then decide either to enact legislation which is rather vague but will mean that bullying can be prosecuted, or enact legislation which is precise, but might allow some bullies to 'get away' with their wrongdoing.⁸

While many commentators see the role of criminal law in political terms—such as ensuring that there is order on the streets—Antony Duff argues that the central role of the criminal law is part of a moral conversation: 'The criminal law provides the institutional framework within which, and procedures through which, perpetrators of public wrongs can be called to account (held responsible) for those wrongs.'⁹ He develops this in the following summary of his thinking of the role of the criminal law:

R.A. Duff, 'Responsibility Citizenship and Criminal Law' in S. Green and R.A. Duff (eds) *Philosophical Foundations of Criminal Law* (Oxford: OUP, 2011), 127

The criminal law, in its substantive dimension, defines certain types of conduct as criminal (and defines certain defences for those who commit such criminal conduct). In so doing, it defines and condemns such conduct as wrong: not merely, and trivially, as legally wrong, as a breach of the rules of this particular game, but as morally wrong in a way that should concern those to whom it speaks, and that warrants the further consequences (trial, conviction, and punishment) that it attaches to such conduct. To say that it defines such conduct as wrong is not, however, to say that it creates that wrongfulness: although it is trivially true that criminal conduct is criminally wrongful only because the criminal law so defines it, it is substantively false to say that such conduct is morally wrongful only because the criminal law defines it as wrong. The criminal law does not (cannot) turn conduct that was not already wrongful into a moral wrong: it does not determine, but presupposes, the moral wrongfulness of the conduct that it defines as criminal; it determines which pre-criminal wrongs should count as 'public' wrongs whose perpetrators are to be called to public account. Its adjectival dimension then specifies the procedures through which those accused of perpetrating such wrongs are called to account: the criminal trial, as the formal culmination of the criminal process, summons a defendant to answer to a charge of public wrongdoing, and to answer for that wrongdoing if it is proved; if he cannot offer an exculpatory answer, he is convicted and thus condemned as a wrongdoer. Finally, in its penal dimension, the criminal law provides for the determination and administration of punishments for those convicted of such public wrongdoing.

⁷ P. Robinson (2002: 79).

⁸ See also the problems that arise in seeking to make extremely violent pornography unlawful (Rowbottom 2006).

⁹ Duff (2011: 126).

3 THE STATISTICS OF CRIMINAL BEHAVIOUR

We will consider the statistics for particular offences when we deal with them separately. But here are some general statistics which give a picture of criminal behaviour in England and Wales. It should be noted that there is a significant difference between reported offences (those reported to the police and officially recorded) and surveys which interview people and try and find out whether they have been the victims of crimes, even if not reported to the police (e.g. the Crime Survey for England and Wales (CSEW)). Studies suggest the following:

- (1) In one survey,¹⁰ 61 per cent of people admitted some kind of offence against the government, their employers, or businesses. For example, 34 per cent admitted paying 'cash in hand' for services to avoid paying tax. Over half of Britain's motorists break the speed limit every day, according to a survey by the RAC.¹¹ So most readers of this book are likely to have committed, or will commit, a crime at some point in their lives. If you don't want to fall into this majority read the following chapters carefully!
- (2) The CSEW estimates that for the years 2012/13 there were 8.6 million crimes committed against adults and 0.8 million crimes committed against children between the ages of 10 and 15. Of these, 3.7 million were reported to the police.¹² There were one million criminal cases dealt with by the courts.
- (3) Five out of every 100 adults aged 16 and over experienced a crime against the person in the previous 12 months (5.2 per cent), while 14 out of every 100 households experienced some type of household crime (14.1 per cent). The likelihood of being a victim of crime decreases with age with a much higher proportion of adults aged 16–24 reporting that they had been a victim of personal crime (11.7 per cent) than other age groups, particularly those aged 75 and over (1.3 per cent).¹³ Women had a 7 per cent risk of being a victim of domestic abuse in 2011/12, while the figure for men was 5 per cent.¹⁴
- (4) Theft offences accounted for 50 per cent of all police recorded crime (1.9 million offences) in 2012/13 and 60 per cent of all incidents measured by the CSEW (an estimated 5.2 million incidents) for the year ending March 2013.¹⁵
- (5) The detection rate of reported offences was 28.9 per cent for 2012/13.¹⁶
- (6) '33% of males and 9% of females born in 1953 had been convicted of a standard list offence before the age of 46'.¹⁷
- (7) The general public grossly overestimates the incidence of violent crime and grossly underestimates the length of sentences that are typically awarded.¹⁸

QUESTIONS

1. Do any of these statistics surprise you? Why?
2. Why is it that the general public appears to have such an inaccurate view of criminal behaviour?

¹⁰ BBC News Online (2007b).

¹¹ BBC News Online (2005a).

¹² Office for National Statistics (2013a).

¹³ *Ibid.*

¹⁴ Office for National Statistics (2013b).

¹⁵ Office for National Statistics (2013a).

¹⁶ Office for National Statistics (2013c).

¹⁷ Home Office (2002: 18).

¹⁸ Mattinson and Mirrlees Black (2000: vii).

FURTHER READING

Office for National Statistics (2013a) *Crime in England and Wales, Year Ending March 2013* (London: ONS).

4 ‘PRINCIPLES’ OF CRIMINAL LAW

We will now turn to some of the so-called principles of criminal law. These are principles which some academic commentators and some judges have suggested underpin the English and Welsh criminal law. It must be emphasized that these are not in any sense strict rules which are followed throughout the criminal law. Rather they are proposed by some academics as principles to which the law should aspire. It should be stressed that some commentators are wary of stating principles that apply across the whole of criminal law and think it is more appropriate to consider the issues as they relate to particular offences.

4.1 THE PRINCIPLE OF LEGALITY

This is the principle that criminal offences should be clearly enough defined to enable people who wish to be law abiding to live their lives confident that they will not be breaking the law.¹⁹ Consider living in a state which had a criminal law: ‘It is a criminal offence to behave badly.’ You would not know what ‘behaving badly’ meant. You may try as hard as you could to live a lawful life but still find that the authorities have regarded a particular piece of conduct as ‘bad’. This principle is often viewed as a key aspect of the ‘Rule of Law’, a notion many constitutional lawyers promote as a central plank of a sound legal system. The principle is now enshrined in our criminal law through the Human Rights Act 1998, as we shall see.

This principle has a number of specific aspects, including the following:

- (1) The law must be clear.
- (2) The law must be capable of being obeyed. A law which prohibited breathing in public would clearly infringe the principle.
- (3) The law must be readily available to the public. If all the laws were kept secret, then even if they were written in the clearest language you would not be able to keep them.

An example of an offence which arguably infringes this principle is section 5 of the Public Order Act 1986, which states that it is an offence to engage in disorderly behaviour or threatening, abusive, or insulting behaviour likely to cause ‘harassment, alarm or distress’. This is a potentially very wide offence, and indeed it provides a discretion for police officers to arrest people for conduct of which they do not approve.²⁰

4.2 THE PRINCIPLE OF RESPONSIBILITY

This is the principle that people should only be guilty in respect of conduct for which they are responsible. So, people should not be guilty for conduct over which they had no control. This

¹⁹ See Westen (2007) for further discussion.

²⁰ See e.g. *Masterson v Holden* [1986] 1 WLR 1017 (DC) where the Divisional Court held that the magistrates were entitled to say that two men kissing were ‘insulting’ passers-by. The defendants were charged under the Metropolitan Police Act 1839, s. 54(13).

principle might be infringed if the criminal law punished a person for behaviour he carried out while suffering from an epileptic fit, for example.

4.3 THE PRINCIPLE OF MINIMAL CRIMINALIZATION

This principle suggests that the criminal law should prohibit something only if absolutely necessary.²¹ There are practical reasons for such a principle: our courts and prisons are overcrowded enough as it is without creating an ever increasing number of offences. But there is also a principled reason for it. A criminal sanction conveys the message that the conduct was not just bad, but bad enough to involve criminal proceedings. This censure function will be lost if less serious conduct is criminalized.²² The criminal law, it should be remembered, is only one way of influencing behaviour that is seen as undesirable. Education, rewarding good behaviour, shaming, and civil proceedings are alternatives that the law has at its disposal for dealing with bad behaviour.²³ So, it must be asked whether it is necessary to have around 8,000 statutes which create criminal offences. Chalmers and Leverick²⁴ claim that recent governments have been especially productive with 1,395 offences created solely in the year 1997/98 and 634 in 2010/11. Many academic commentators have expressed concern that we have far too much criminal law.²⁵ Many law students would agree! In particular there is a concern that creating a new criminal offence is an easy response for politicians to the 'issue of the day'. Dennis Baker has suggested we need to recognize a right not to be criminalized.²⁶

In the following extract, Andrew Ashworth argues that the state has become too keen to use the criminal law to deal with 'troublesome' behaviour.²⁷

A. Ashworth, 'Is Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225

The number of offences in English criminal law continues to grow year by year. Politicians, pressure groups, journalists and others often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern. At the same time, criminal offences are tacked on to diverse statutes by various government departments, and then enacted (or, often, re-enacted) by Parliament without demur. There is little sense that the decision to introduce a new offence should only be made after certain conditions have been satisfied, little sense that making conduct criminal is a step of considerable social significance. It is this unprincipled and chaotic construction of the criminal law that prompts the question whether it is a lost cause. From the point of view of governments it is clearly not a lost cause: it is a multi-purpose tool, often creating the favourable impression that certain misconduct has been taken seriously and dealt with appropriately. But from any principled viewpoint there are important issues—of how the criminal law ought to be shaped, of what its social significance should be, of when it should be used and when not—which are simply not being addressed in the majority of instances.

...

Despite the disorderly state of English criminal law, it appears that the Government does profess some principles for criminalisation. In response to a parliamentary question, Lord

²¹ Husak (2008). ²² Feinberg (1986: ch. 5). ²³ Card and Ashworth (2000).

²⁴ Chalmers and Leverick (2013). ²⁵ See e.g. Baker (2011b). ²⁶ Baker (2011b).

²⁷ See also the use of ASBOs (anti-social behaviour orders) (see Squires (2008), Burney (2005), and von Hirsch and Simester (2006)). See Baker (2007) for a discussion of broader issues surrounding remote harms.

Williams of Mostyn has stated that offences 'should be created only when absolutely necessary', and that

'In considering whether new offences should be created, factors taken into account include whether:

- the behaviour in question is sufficiently serious to warrant intervention by the criminal law;
- the mischief could be dealt with under existing legislation or by using other remedies;
- the proposed offence is enforceable in practice;
- the proposed offence is tightly-drawn and legally sound; and
- the proposed penalty is commensurate with the seriousness of the offence.

The Government also takes into account the need to ensure, as far as practicable, that there is consistency across the sentencing framework.'

...

Although I have tried in this essay to give some flavour of the proliferation of legal forms and structures for the guidance of conduct, and thereby to demonstrate a blurring of the boundaries between criminal and regulatory and between criminal and civil, the main purpose has been to develop two lines of argument.

The first is that the criminal law is indeed a lost cause, from the point of view of principle. The Government's purported criteria for creating new crimes are not followed in practice, nor have they been in the recent past. *Pace* Lord Williams, new offences have been created to penalise non-serious misbehaviour, sometimes with maximum sentences out of proportion to other maxima. The empirical basis for this claim was illustrated by examples from the 1997 statute book, and particularly the offence in section 1 of the Crime and Disorder Act 1998 of breaching an anti-social behaviour order. The plain fact is that governments often take the view that the creation of a new crime sends out a symbolic message that, in blunt terms, may 'get them off a political hook'—even though the new crime fails to satisfy Lord Williams' criteria on one or more grounds.

The second line of argument is more constructive, in seeking to identify a principled core of criminal law. The core consists, it is submitted, of four interlinking principles:

The principle that the criminal law should be used, and only used, to censure persons for substantial wrongdoings. The principle recognises that the prevention of such misconduct is a reason for criminalising it: if serious wrongdoing can be identified, it is of social importance that its incidence be reduced. However, this should be distinguished from the less acceptable propositions (a) that the prevention of misconduct is a sufficient reason for criminalisation, and (b) that the criminal law is, either on its own or in combination with other social policies, necessarily an effective means of prevention. The tendency to over-estimate the deterrent efficacy of criminal sentencing has already been mentioned. As for crime prevention strategies, these are usually designed to minimise the risk that certain situations or opportunities will come about, or that certain individuals will find it attractive to behave in particular ways. Appropriately targeted social, educational and housing policies may well have a greater preventive effect than the enactment of a criminal offence and the conviction of (what is likely to be) a relatively small proportion of offenders, a point rarely acknowledged in the political and media discussions that lead to the creation of new crimes. However, methods of crime prevention also raise questions of moral and social principle that should be kept in view.

The principle that criminal laws should be enforced with respect for equal treatment and proportionality. The implication is that enforcement authorities and their policies ought to be reorganised so as to reflect the relative seriousness of the wrongdoing with which they are dealing, and should not remain hidebound by traditional divisions of responsibility that fail to reflect proper assessments of the culpable wrongs involved.

The principle that persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences, i.e. at least the minimum protections declared by Articles 6.2 and 6.3 of the European Convention on Human Rights. These minimum protections ought to be regarded as an inherent element of criminal procedure, and this principle as interlinked with the others. Thus, if wrongdoing is regarded as serious enough to warrant the creation of an offence, and if it is thought so serious as to require a substantial maximum sentence, it would be a violation of this principle for a government to avoid or whittle down the protections that a person facing such a charge ought to be accorded. This, it will be recalled, is one objection to the offence of failing to comply with an anti-social behaviour order contrary to section 1 of the Crime and Disorder Act 1998. A maximum penalty of five years' imprisonment has been provided for what is a strict liability offence, all the substantive issues having been determined in earlier civil proceedings without the Article 6 safeguards. Civil-criminal hybrids designed to circumvent Convention rights are wrong in principle.

The principle that maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing. The implication here, as with the second principle, is that there needs to be a root-and-branch change—a thorough revision of maximum penalties and a re-assessment of sentence levels and of differentials between them.

These are put forward as core principles. It is not claimed that they should be regarded as absolute rules, and indeed at various points above some possible qualifications to them have been discussed. Derogations from them should be argued as derogations, and should be principled in themselves.

The principles also lead in other directions that cannot be examined fully in this context. At the core is the idea that, if a particular wrong is thought serious enough to justify the possibility of a custodial sentence, that wrong should be treated as a crime, with fault required and proper procedural protection for defendants. This has implications for those minor wrongs that are presently made the subject of criminal offences simply because the criminal courts offer themselves as a quick and cheap means of dealing with them: many of the 1997 offences fall into this category, as do hundreds of other strict liability offences. A fine solution would be to create a new category of 'civil violation' or 'administrative offence' which would certainly be non-imprisonable and would normally attract a financial penalty; procedures would be simplified but would preserve minimum rights for defendants, such as access to a criminal court. Another implication of the principles should be that any new criminal code for this country ought to declare the most serious offences in English law, rather than simply those traditional offences that have been the focus of textbooks over the years.

What are the prospects for thus re-structuring and restoring integrity to the criminal law? Political reality suggests that they are unpromising: in this sense, the criminal law may be a lost cause. Even governments with large parliamentary majorities, and which profess certain criteria for the creation of new offences, may either give way to the allure of media popularity or simply not care sufficiently to adhere to their own principles. In such political circumstances it is all the more necessary to re-ignite debate about the functions and characteristics that the criminal law ought to have, and to ensure that the close interconnections between criminal law, criminal procedure and sentencing are kept at the forefront of that debate.

4.4 THE PRINCIPLE OF PROPORTIONALITY

The sentence accorded to a crime should reflect the seriousness of the offence. This is, in a way, obvious.²⁸ It would clearly be wrong if murder carried a less serious sentence than assault.

²⁸ Although see von Hirsch and Ashworth (2005) and Koffman (2006) for a discussion of the difficulties in putting this principle into practice.

But there are more complex arguments over whether one offence is more or less serious than another: is rape more or less serious than having a hand cut off?

To deal with such harder cases, we need a way of grading the seriousness of the harm suffered by the victim. Joel Feinberg suggests focusing on the victim's loss of opportunity or range of choices. Clearly, therefore, murder is the most serious offence as it completely destroys the victim's range of opportunities or choices. Andrew von Hirsch and Nils Jareborg have suggested another, which focuses on the following²⁹ four kinds of interests:

- (1) physical integrity: health, safety, and the avoidance of physical pain;
- (2) material support and amenity: includes nutrition, shelter, and other basic amenities;
- (3) freedom from humiliation or degrading treatment;
- (4) privacy and autonomy.

In assessing the degree of harm suffered you should first determine which interests of the victim have been interfered with and then consider the extent of the interference. This involves considering how far it affects the victim's 'living standard': the basic things a person needs to achieve a good life. An assessment of harm will also involve considering the blameworthiness of the defendant.

Such an approach has the benefit of providing a focus for determining the extent of harm: how far it impedes victims in living a good life. However, it leaves open the question of what is a good life. It also focuses on the impact of the crime on the victim, and does not capture the sense that a crime involves a public wrong. This concept is explored in the following extract:

A. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn, Oxford: OUP, 2013), 29–30

[Another] aspect, in addition to harmfulness and wrongfulness, is the public element in wrongs. One manifestation of this consists of those general obligations of citizens that are so important that the criminal sanction may be justified to reinforce them. A core of offences against state security may be justified on these grounds, as may some offences against the taxation and benefits system, so long as the limiting effect of the minimalising principle... is kept in view. These are public wrongs, inasmuch as the victim is not an individual but the community as a whole, and it is right that the more serious among them are considered suitable for criminalization—not least where the gain or advantage obtained is as great as, or greater than, that obtained in the typical offence with an individual victim. But it is to the latter kind of offence that we must now turn, and this is where the public element becomes problematic. How can we tell which wrongs done to the individual are sufficiently 'public' to warrant the condemnation of the criminal law? As Antony Duff [(2007)] argues, the answer lies not in an aspect of the wrong itself, but in the public valuation of the wrong:

We should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public, i.e. the polity as a whole... A public wrong is thus a wrong against the polity as a whole, not just the individual victim: given our identification with the victim as a fellow citizen, and our shared commitment to the values that the rapist violates, we must see the victim's wrong as also being our wrong.

²⁹ von Hirsch and Jareborg (1991).

The public element does not have anything to do with location: unkind remarks made to a friend in public would not 'concern the public' unless they tended to provoke a breach of the peace, and a very public breaking of a promise to attend a certain event may not be regarded as sufficiently important for the polity as a whole to be required to take action. Contrast those instances with domestic violence (e.g. a substantial beating) which, even if it occurs entirely in the private realm of a home, is a moral and social wrong that the community should regard as a wrong that ought to be pursued through the public channels of prosecution and trial. Thus, as Grant Lamond [(2007)] has argued, the question is whether the community is appropriately responsible for punishing these wrongs. The supporting argument here is presumably that the state should protect and promote the basic value of security and freedom from physical attack by prosecuting assaults wherever they occur (leaving aside questions of consent and its proper limits), and that the fact that an assault occurs in a domestic context should make no difference to this. It does not follow from this that adultery is a good candidate for criminalization, harmful and wrongful though it may be in many instances, since the question is whether the value of marriage as an institution is so central and fundamental to the political community that the state is expected to prosecute through the criminal law those whose conduct threatens it.

4.5 THE PRINCIPLE OF FAIR LABELLING

This principle requires that the description of the offence should match the wrong done.³⁰ If the definition of a crime in law departs too markedly from the definition as understood by the general public then the law may fall into disrepute. When defining a crime it is helpful to distinguish the loss a victim suffers and the wrong done to a victim. This point can be made by way of an example: Alf steals Ben's book; Catherine destroys Davina's book. Both Ben and Davina suffer the same loss: their books are gone. But the wrongs done to them are different: the way their property was lost matters in moral terms. Hence the criminal law distinguishes between criminal damage and theft.³¹ There is more to this point than that. Imagine that both Edward and Fred are pushed over, but Fred was deliberately pushed over and Edward accidentally. They may have suffered the same harm, but the wrong done to them was different. Edward might laugh the event off as an accident, expecting an apology at most. However, Fred would regard the incident as a serious invasion of his right to bodily integrity.³² So the state of mind of the defendant is an important aspect of the wrong done to the victim.

One uncertainty surrounding the issue of labels, is the question of to whom the labels in criminal law are addressed. Are we seeking descriptions which will carry meaning for members of the general public, or meanings which have significance for professionals working in the criminal justice system?³³

FURTHER READING

Ashworth, A. (2000c) 'Is the Criminal Law a Lost Cause?' *Law Quarterly Review* 116: 225.

Ashworth, A. (2004) 'Social Control and Anti-Social Behaviour' *Law Quarterly Review* 120: 263.

³⁰ Chalmers and Leverick (2008); Mitchell (2001).

³¹ Duff (2002: 6).

³² J. Gardner (1998a: 211).

³³ Chalmers and Leverick (2008).

- Baker, D. (2007) 'The Moral Limits of Criminalizing Remote Harms' *New Criminal Law Review* 10: 370.
- Baker, D. (2011b) *The Right Not to be Criminalized* (Aldershot: Ashgate).
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- Mitchell, B. (2001) 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' *Modern Law Review* 64: 393.
- Tadros, V. (2012) 'Fair Labelling and Social Solidarity' in L. Zedner and J. Roberts (eds) *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford: OUP).

5 PROPOSALS FOR A CRIMINAL CODE

The failure of English and Welsh criminal law to live up to the principles we have just been discussing has led some to suggest that the government should produce a Criminal Code. This would be a single statute which would seek to describe the criminal law (or the important parts of criminal law) in one document in clear language. In producing such a Code, it would be possible to seek to adhere to the principles mentioned in Section 4 as much as possible. Indeed the Law Commission undertook the job of drafting such a Code.³⁴ However, in 2008 the Law Commission indicated that it had abandoned its work on the Code.³⁵ Instead, it decided to focus its work on producing proposals to reform particular areas of the law. In an editorial entitled 'RIP: The Criminal Code (1968–2008)' the editors of the *Criminal Law Review* expressed their grave disappointment at this news, saying it was a 'sad end for a noble ideal'.³⁶ Although, at first, the idea of a Code might be thought an unmitigated blessing (especially for law students!), in fact it has not proved universally popular.³⁷

5.1 ARGUMENTS IN FAVOUR OF A CODE

(1) **Certainty** The argument in favour of codification is that it will create a clearly stated rule which will govern whether a person is guilty. This avoids the common law approach of having rather vaguely defined offences whose interpretation can be expanded or contracted by the judge to fit the justice of the particular case. Of course, codification will not produce a criminal law which is absolutely clear in every regard and it would be wrong to think that all common law offences are utterly vague, but the argument is that a Criminal Code should reduce the circumstances in which the principle of legality is breached. The point can also be made in constitutional terms—that a Code would help uphold the separation of powers: that the creation of the law should be for Parliament not the judiciary.

³⁴ For another version of a Code, see P. Robinson (1997) (criticized in Mitchell (2001) and Duff (2002)).

³⁵ Law Commission (2008). ³⁶ Editor of the *Criminal Law Review* (2009).

³⁷ Although for a recent attempt to revive the argument in favour of the Code, see Lavery (2010).

(2) **Accessibility** If a member of the public wanted to find out what the criminal law was at present, she or he could not find one document that sets out the criminal law. To get hold of all the statutes and all the case law to provide an effective guide to the present law would be a marathon task.³⁸ Toulson LJ has made a forceful attack on the lack of access to statutes. Indeed he has said it is ‘profoundly unsatisfactory’ if statutory law is not accessible, and he says that statutes are not even readily accessible to courts.³⁹ In theory, if the entire criminal law could be found in a Code it could become readily available to the general public at all good booksellers.

Such arguments have led Paul Robinson⁴⁰ to propose a Code which distinguishes between rules of conduct and rules of attribution.⁴¹ He sees the rules of conduct as primarily aimed at sending clear messages⁴² to citizens telling them what they can and cannot do in simple terms.⁴³ Controversially, this means that the conduct rules do not include references to the results that arise from the acts or to states of mind.⁴⁴ By contrast, rules of attribution are directed towards judges or juries telling them when a particular person should be convicted for infringing a rule of attribution. This distinction has the benefit, he claims, of keeping the rules of conduct (which are directed to the general public) as brief and clear as possible.

Critics of Robinson’s approach have argued that rules of conduct can be of little use if they do not include an indication of a state of mind. Take rape: a citizen who was seeking to obey the law would conduct his or her sex life quite differently if the law on rape was a strict liability offence than if it was an intention-based offence.⁴⁵ Antony Duff has suggested that it is unlikely that members of the public will read a Code and that it is more important that the Code makes moral sense in that it reflects community values rather than that it is linguistically clear.⁴⁶

(3) **Efficiency** The benefits mentioned so far—certainty and accessibility—would also work, it is argued, to make courts more efficient. The judge will be able to give a clear direction on the law to the jury, making the jury’s job easier and lessening the need for appeals to the Court of Appeal following a misdirection by judges.

(4) **Consistency** Proponents of a Code argue that in drafting it the contradictions and ambiguities in the law can be removed.

(5) **Updating** The Code would provide the opportunity to rid the law of ‘old fashioned offences’, which might have made sense when they were passed, but seem bizarre in the twenty-first century. Is it really necessary to have the offence of ‘assaulting a clergyman in the discharge of his duties in a place of worship or burial place’?⁴⁷

5.2 DISADVANTAGES OF THE CODE

The following are some of the alleged disadvantages of a Criminal Code:

(1) **Obsession with ‘consistency’** There is a concern that if the Code were to become obsessed with guiding principles and internal consistency this might overlook the fact that apparent contradictions within the criminal law in fact reflect the complexity of the many

³⁸ Purchasing a textbook on the criminal law would be much easier!

³⁹ *Chambers* [2008] EWCA Crim 2467. ⁴⁰ P. Robinson (1997); P. Robinson (1990).

⁴¹ P. Robinson (1997). See also Dan-Cohen (2002: ch. 2).

⁴² He describes rules of conduct as having a ‘communicative function’.

⁴³ P. Robinson (1997: 128).

⁴⁴ For criticism of this, see Husak (1999a).

⁴⁵ Duff (2002: 69).

⁴⁶ Duff (2002). For arguments against Duff’s view, see Alldridge (2002).

⁴⁷ Offences Against the Person Act 1861, s. 36.

political, ethical, and practical issues involved in developing the law for a particular offence.⁴⁸ Apparently, contradictory aspects of the criminal law may in fact prove to be a workable compromise for those areas of the law. Further, the views of the public on what may be an acceptable criminal law are not always consistent or rational. This may justify a criminal law which, although ‘irrational’, perhaps reflects the public morality.

(2) **The benefits of a Code are overemphasized**⁴⁹ It is not realistic that *The Code* will hit the bestseller list. Further, hard cases are hard cases because they involve a clash of important principles. For example, the infamous conjoined twins case⁵⁰ (see Chapter 12) raised extremely difficult questions for law and morality. That case would have been no easier were there a Code in place.

FURTHER READING

de Búrca, G. and Gardner, S. (1990) ‘The Codification of the Criminal Law’ *Oxford Journal of Legal Studies* 10: 559.

Robinson, P. (1998) *Structure and Function of Criminal Law* (Oxford: OUP).

6 WHAT CONDUCT SHOULD BE CRIMINAL?

How should the state decide which conduct should, or should not, be criminal? Why should Parliament not make swearing in a public place an offence?⁵¹ We shall shortly consider the extensive academic analysis of this question. But before doing so it is worth emphasizing that in practice a government’s decision on whether to criminalize something is normally a matter of political expediency, rather than fine-sounding principles.⁵² For example, in 1990 there was a media campaign against the horrors of ‘killer dogs’, featuring horrific photographs of children attacked by vicious dogs. The campaign called upon Parliament to ‘do something’. In the light of such a campaign, it is hard for politicians not to react, not least for fear that in due course there might be other children harmed by dogs and the press would then say ‘if only you had passed legislation this child would have been saved’. Indeed in due course the Dangerous Dogs Act 1991 was passed.⁵³ The political pressure to increase the number of criminal offences has led some academics to argue that we need to articulate principles to restrict the tendency to create new offences.

These are some of the principles academics have suggested should govern Parliament’s decisions on criminalization.

6.1 AUTONOMY

To many commentators the right of autonomy, the right to live one’s life as one likes, is of fundamental importance.⁵⁴ Making decisions for ourselves means that we can be proud of the

⁴⁸ de Búrca and Gardner (1990). ⁴⁹ Clarkson (1994).

⁵⁰ *Re A (Conjoined Twins: Medical Treatment)* [2000] 4 All ER 961 (CA).

⁵¹ Although it might be necessary first to repeal the Human Rights Act 1998 (which protects the freedom of speech).

⁵² See Ashworth (2000c).

⁵³ Arguably another example is the substantial amount of terrorist legislation which was passed as a swift response to the events of 11 September 2001 (for discussion, see Fenwick (2002)).

⁵⁴ Raz (1985).

good things that we do, but also that we can be ashamed of, and deserve blame for, the bad things we do. Autonomy plays three crucial roles in defining the criminal law:

- (1) It justifies the existence of the criminal law. Without the criminal law, other people could, without punishment, interfere with my right to live my life as I choose. In other words, the criminal law is necessary to prevent one person's exercise of autonomy interfering with another's.
- (2) It restricts the extent of the criminal law. The criminal law impinges on people's autonomy. If the criminal law made it illegal for same-sex couples to engage in consenting sexual relationships, this would interfere with how many people would like to live their lives. The autonomy principle therefore explains why it is only where the activity causes a significant amount of harm to others or to society that the law is justified in prohibiting it.
- (3) It justifies censure. If we are autonomous citizens, able to live our lives as we choose, then we should be responsible for the bad choices we make as well as the good ones. In other words, the autonomy principle explains why people should be liable for making the wrong choice, and also explains that where people do not have a free choice to act as they should the criminal law provides a defence (e.g. where they are acting under duress).

It should not be thought that the autonomy principle is uncontroversial. First, there are some who point out that the right to choose how to live our lives may be available for the rich, the able, and advantaged, but it may be regarded as a chimera for the poor, the disabled, and the disadvantaged.⁵⁵ Indeed one of the leading proponents of the importance of autonomy, Joseph Raz, has argued that if the state wants to take the right of autonomy seriously it must ensure that the social conditions necessary for the exercise of full autonomy are provided.⁵⁶

For others there are concerns that the autonomy principle overemphasizes individualism.⁵⁷ It talks about the right for me to pursue my vision of the 'good life', but for many people their vision of the good life is tied up with families, friends, and communities.⁵⁸ For them the promotion of the good life might mean the promotion of the good of groups of people. Criminal law may be required to ensure proper regulation of common life. So seen, far from criminal law undermining autonomy it may be essential to enable people to exercise their autonomy.

There are many offences which appear to protect people from themselves and cannot readily be justified by the autonomy principle.⁵⁹ One well-known example is the requirement that people travelling in cars wear seat belts. We feel that although we respect people's choices, there comes a point where the law states 'we will not allow you to do such a dangerous thing'.

The autonomy principle is behind one of the most popular theories explaining when a state may criminalize: the harm principle.⁶⁰

⁵⁵ Hudson (1994). ⁵⁶ Raz (1986). ⁵⁷ Herring (2009a) and Fineman (2004).

⁵⁸ Herring (2013d).

⁵⁹ This leads Dan-Cohen (2000) to argue that the concept of dignity, rather than autonomy or welfare, should be the basis of the law.

⁶⁰ For further discussion, see Baker (2011a and 2011b); Herring (2012b: ch. 1).

6.2 THE HARM PRINCIPLE

The leading exposition of the harm principle is provided by John Stuart Mill with his famous essay, *On Liberty*. At the heart of his argument is the following:

The only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear . . . because in the opinion of others to do so would be wise or even right.⁶¹

Essentially, then, the harm principle is that each person should be allowed to do and say what he or she likes provided that this does not harm the interests of others. Simply because an activity is seen as immoral or harmful to the actor is not a good enough reason to justify criminalizing it.⁶² The harm principle tells us what sorts of behaviour should *not* be criminalized. Just because conduct harms others does not mean that supporters of the harm principle would necessarily support criminalizing it.⁶³ Indeed Hamish Stewart has argued that in respect of some kinds of conduct people have a right to engage in it, however harmful it might be.⁶⁴ Further, there is a wide range of ways that the state could use to respond to undesirable activity, criminalization being only one of them.⁶⁵

In recent times, the harm principle has received powerful support from the work of Joel Feinberg, who in three highly influential books has sought to interpret and justify a modern understanding of the principle. In the following extract, Douglas Husak summarizes and discusses Feinberg's theory:

D. Husak, 'The Nature and Justifiability of Nonconsummate Offences' (1995) 37 *Arizona Law Review* 151 at 155–9

Most theorists agree that the criminal sanction should be imposed only for blameworthy and wrongful conduct. This necessary condition of justified criminal legislation might be called the *wrongfulness* requirement. The most persuasive of many possible arguments in support of this requirement focuses on the institution of criminal punishment. Violations of the criminal law, by definition, are subject to the penal sanction. This sanction involves the deliberate infliction of a hardship. The deliberate infliction of a hardship requires a justification. It is hard to see how punishment could be justified unless a person deserves to be punished, and it is unclear how a person could deserve to be punished unless his conduct is blameworthy and wrongful.

There are principled reasons not to criminalize all wrongful and blameworthy conduct, even if the practical difficulties of enforcement could be overcome. Immorality is a necessary, but not a sufficient condition for criminalization. Commentators have struggled to identify that

⁶¹ Mill (1991).

⁶² See further Gross (2007: 225–7) who sees human rights as an important tool in ensuring criminal law is not used to promote moral values, rather than protecting against harm.

⁶³ Gardner (1998: 229) suggests that an activity needs to be both harmful and base or worthless to justify criminalization.

⁶⁴ Stewart (2009). He does not provide specific examples, but consensual sexual acts in private might be seen by some as one example.

⁶⁵ Tadros (2010).

subclass of wrongful conduct that is eligible for punishment. The *harm* requirement provides the most plausible solution to this problem. Joel Feinberg's work represents the most ambitious and impressive defence of what he calls a *liberal* theory of law, characterized as the thesis that the only good reason to subject persons to criminal punishment is to prevent them from wrongfully causing harm to others.

According to Feinberg, 'the sense of "harm" as that term is used in the harm principle must represent the overlap of [normative and non-normative senses]: only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense.' In the 'normative' sense of harm, A harms B 'by wronging B, or by treating him unjustly.' In the 'non-normative' sense of harm, A harms B 'by invading, and thereby setting back, his interest.' The need for an overlap of these two senses should be apparent. Harmful but permissible conduct is not eligible for criminal penalties because it fails to satisfy the wrongfulness requirement. Person A might set back the interests of person B—thereby placing B in a 'harmed condition'—through a legitimate competition, for example. But A's conduct should not be criminalized because B has not been wronged or treated unjustly. The interests of B may have been set back and *infringed*, but they have not been *violated*. Conversely, harmless but impermissible conduct is not eligible for criminal penalties because it does not set back anyone's interests. Person A might behave immorally without victimizing anyone. But A's conduct should not be criminalized because no one has been harmed.

The 'overlap' of these two senses of harm can be expressed succinctly by invoking the concept of rights: All wrongful conduct that sets back the interests of others violates their rights. Thus Feinberg's liberal framework establishes the moral limits of the criminal law by reference to the rights of persons. As expressed succinctly, 'criminal prohibitions are legitimate only when they protect individual rights.'

Feinberg claims no originality on behalf of his general thesis, which he locates squarely in the tradition of John Stuart Mill. The novelty of his approach lies in the details of his explication of the harm principle. In particular, Feinberg's interpretation provides a response to two reservations that have long been expressed about the harm requirement, even by theorists who tend to sympathize with it. First, many commentators have feared that the harm requirement is empty, trivial, tautological, or vacuous. If *any* undesirable consequence can be countenanced as a harm, all serious candidates for criminal legislation will satisfy the harm requirement. Second, many commentators have endorsed the harm principle because they believe that the criminal law should not be used to enforce morality. According to these theorists it is harm, rather than immorality, that should be prevented by the criminal law. Thus harm is sometimes thought to represent an alternative to the proposal that the criminal law should enforce morality.

Among Feinberg's central achievements are his responses to each of these two reservations. He interprets the harm requirement as nontrivial and full of substantive content, much of which is clearly moral in nature. Applications of his liberal theory entail that criminal intervention is unjustified in principle unless (a) the rights of someone are set back by (b) wrongful conduct. According to this view, the harm requirement cannot function as a genuine alternative to the claim that the criminal law should enforce morality, but rather identifies that subclass of immoral conduct that the criminal law should proscribe.

A detailed account of the specific instances of legislation that should be rejected as incompatible with a liberal theory of law requires at least two supplementary theories: first, a theory of moral rights, and second, a theory of wrongful conduct. Feinberg is well aware of the need for these two supplementary theories. He is equally aware that neither of these theories is easy to produce, and he does not pretend to have completed the task. Still, a virtue of Feinberg's account is that it clearly identifies the kinds of work that remain to be completed in order to provide a comprehensive theory of the moral limits of the criminal law.

Even without these two supplementary theories, one would anticipate few difficulties in applying Feinberg's views to justify enactment of the most familiar criminal offenses in Anglo-American law. Consider theft. Rights in personal property that are set back by acts of theft are a familiar part of virtually all theories of rights. In addition, the wrongfulness of theft is widely acknowledged. Thus the application of a liberal theory to justify the creation and enforcement of the offense of theft seems unproblematic.

Moreover, Feinberg's views are equally plausible when applied to reveal the deficiencies in proposals to create new criminal legislation that most everyone would denounce as an unjustifiable exercise of state authority. Consider a hypothetical proposal to enact criminal legislation to prohibit persons from dropping out of school prior to graduation. No one doubts the utility of an educated citizenry. But does someone who fails to complete his education act wrongfully (as opposed to foolishly or imprudently)? Does he set back anyone's rights (apart from his own long-term interests)? Unless both of these questions can be answered affirmatively, a liberal theory of law, as explicated by Feinberg, would preclude enacting criminal legislation for this purpose.

Of course, a sponsor of such legislation could always insist that rights *are* set back, and that conduct *is* wrongful, whenever persons drop out of school. It may be impossible to persuade such a sponsor without actually providing supplementary theories of rights and wrongful conduct. In the absence of these two supplementary theories, one can only hope that the intuitive implausibility of these claims would be recognized. In this context, this hope seems reasonable. The judgment that persons should be punished for failing to graduate is not easily brought into 'reflective equilibrium' with other judgments about rights and wrongful conduct, both specific and general, that persons tend to endorse. Thus Feinberg's liberal theory of law, when accompanied by widely shared judgments about the supplementary theories required by its application, seems to escape the charge that the harm principle is trivial and vacuous. His theory supports criminal legislation of which most everyone approves, and condemns criminal legislation of which most everyone disapproves. A liberal theory—according to which the criminal law should not be used except to prevent persons from violating the moral rights of others—is enormously valuable to help identify the moral limits of the criminal law.

As this passage indicates, the harm principle itself is fairly straightforward. But at its heart is the concept of harm, and it is far from clear what that means. There is little disagreement that cuts, bruises, and death count as harms, but other issues are less straightforward. Indeed some commentators have argued that the principle is so vague that it can justify pretty much whatever conclusion you want to reach.⁶⁶ Nevertheless, debates over harm play a central role in the debates over when it should be illegal to smoke in public.⁶⁷ A key point that swayed that debate was that passive smoking caused harm to other people.

Is offence harm?

If Edna goes shopping and sees someone walking down the street naked she may be very offended. Is this offence 'harm' for the purposes of the harm principle?⁶⁸ Joel Feinberg supports the prohibition of conduct that causes offence. But he uses a strict definition of 'offence'. Offence involves more than concern or disapproval. An example might be the feelings relatives would have if they found that the body of their loved one had been horribly desecrated. It

⁶⁶ Harcourt (1999). ⁶⁷ Ferguson (2011).

⁶⁸ See Simester and von Hirsch (2002) and Feinberg (1986b).

is unlikely Edna's outrage would be sufficient. For other academics no degree of offence is sufficient to constitute a 'harm'. To permit offence to be harm enables one set of people to impose their moral values on others. Indeed the more hard line they are, the more likely they are to be profoundly disturbed, and so the more likely to fall within Feinberg's definition of 'offence'.

Is harm to future generations harm?

This issue is relevant in particular to environmental legislation. If it is demonstrated that an activity will not harm anyone presently living but will have long-term environmental damage which might harm future generations, would this be harm for the purposes of the harm principle?

Are potential harms harm?

What about conduct which in itself is not harmful but which carries the risk of causing harm?⁶⁹ For example, the criminal law prohibits possession of a firearm. The prohibition is not based on the fact that possession itself harms society; rather the possession of firearms generally is likely to increase their use, which can be regarded as a harm.⁷⁰ To some there are grave dangers in accepting potential harms as harms.⁷¹ All kinds of activity are potentially harmful.

Is damage to the public good a harm?

What about offences which are designed not to prevent the harm to individuals, but harm to society generally?⁷² Some traffic laws, building regulations, and state security regulations cannot be said to protect identifiable people, but rather are justified for the good running of society as a whole.⁷³ Are these reconcilable with the harm principle? Robin West, writing from a feminist perspective, has argued that the law should recognize harms to groups and to society. She complains that too often the law sees harm in terms of the harm to individuals rather than harm to people as connected individuals in relationships.⁷⁴ Susan Marshall and Antony Duff have discussed the way in which a criminal offence harms not just the victim but the wider community.⁷⁵ Others are concerned that once 'harms' to groups are taken into account the floodgates may be opened. In the following passage Antony Duff discusses three wrongs he believes the criminal law should be particularly concerned with:

R.A. Duff, 'Towards a Theory of Criminal Law?', *Proceedings of the Aristotelian Society Supplementary Volume* (2010), vol lxxxiv, 1 at 23–4

Here are three kinds of wrong that we surely have good reason to criminalize. First, there are victimizing wrongs which constitute such serious violations of the polity's values, or of one of its members, that to fail to condemn them and to call their perpetrators to account would be to betray those values.... Obvious examples here are serious attacks on the person—murder, rape, other kinds of physical assault, perhaps also harassment; but this category could also

⁶⁹ See Oberdiek (2009) for discussion. ⁷⁰ von Hirsch (1996).

⁷¹ von Hirsch (1985). See also the excellent discussion in Baker (2009). ⁷² Howe (1991).

⁷³ Husak (2005); Duff and Green (2005: 8); and Brudner (1993). ⁷⁴ West (1988).

⁷⁵ See Madden Dempsey (2009b) for a rejection of this view.

include, for instance, the kinds of racist abuse that deny their victims' full membership of the polity. Some of these wrongs directly implicate citizenship: they involve treating the victim in ways that we should not treat a fellow citizen, in ways that deny their fellow membership of the polity. Others do not thus directly implicate citizenship: what is wrong with murder, rape and other kinds of attack on the person is not that this is not how we should treat fellow citizens, but that this is not how we should treat another human being.

But both kinds of wrong are criminalizable because we owe it to each other to take appropriate notice of such attacks on or by our fellows—and appropriate notice includes condemning the wrong and calling its perpetrator to account. These are also kinds of wrong which, we may say, it would be wrong for the victim to ignore: he owes it to himself, as a matter of self-respect, or to his fellows, out of respect for their shared values, to pursue the wrongdoer, or to assist in his prosecution (which is why prosecutions in such cases should not depend on the victim's consent). Wrongs of this kind constitute perhaps the core of the criminal law.

Second, there are wrongs whose only victims are the polity, or its members collectively: wrongs that are public in the sense being used here, as wrongs that concern the public, just because they are public in the other sense of having an impact on the public rather than on any identifiable individual victim. Some of these will be wrongs of endangerment: examples include a range of driving offences, various kinds of pollution, and breaches of health and safety requirements. Others are wrongs (such as tax evasion, perjury, the bribery of officials) that bear on the polity's essential public institutions. There will of course be questions about whether and when criminalization is an appropriate response to such wrongs, especially those that consist in endangerment rather than in attack; but we have good reason to criminalize them when they involve a serious disregard for the duties of care that we owe our fellows, or for the institutions on which the civic enterprise depends.

Third, there are '*mala prohibita*': wrongs that consist in the breach of a legal regulation which imposes a (typically fairly modest) burden on citizens in order to serve some aspect of the common good. Regulations connected with licensing provide the clearest examples of such wrongs. In the purest cases, the conduct required is impossible, and we can therefore have no reason or duty to engage in it, in the absence of the relevant legal regulation: I could not obtain a driving licence, or display a tax disc, independently of the relevant regulations about driving, and could thus commit no wrong by not doing so. Once the regulations are in place, however, and are justified as serving the common good, I have a civic duty to comply with them, and do wrong if I fail to comply; we then have reason to criminalize such wrongs.

I do not suggest that these three types of criminalizable wrong are mutually exclusive or exhaustive—indeed, I am sure that they are not. All I mean to suggest here is that this is how we need to tackle the criminalization issue: to identify types, or paradigms, of criminalizable conduct, understand why we have reason to criminalize them, and then deal with problematic cases by comparing and contrasting them with these paradigms.

Moral principles

One of the key elements of the harm principle is that an activity cannot be criminalized simply because it is regarded as immoral.⁷⁶ However, some people argue that there are some moral principles which are central to the well-being of society. Consider the debate over fox hunting. Leaving aside all the other issues, one argument that can be made is that our society is a less civilized and more cruel society if we allow fox hunting. It diminishes society and what it stands for. Many people will disagree. But these kinds of arguments suggest that when

⁷⁶ See the discussions in J. Gardner (2007); Alldrige (2002).

thinking about society's welfare there will be a wide range of views on what is good for society. Lord Devlin⁷⁷ has argued that there is a 'moral cement' that helps to keep society together, and that the state is entitled to use the criminal law to protect that cement from being damaged by behaviour which infringes those principles. He suggests that the extent of disgust felt by society at a particular kind of activity would indicate whether it challenged a fundamental value that underpinned society.⁷⁸

There is much about this argument which can be challenged. For example, in a multi-cultural, multi-faith society, is it true there are moral principles which can be regarded as so fundamental to the way people live their lives that they are society's 'cement'? Even if you think there are, is it true that the fact that a few people break those moral taboos harms that cement? Was Devlin correct to suggest that disgust indicates how precious a moral value is to society?⁷⁹ Many people experience great disgust at the picking of a nose, but that does not indicate that it reflects a fundamental moral principle!

There has been somewhat of a revival in support for moralism as a basis for criminal law.⁸⁰ One benefit is that it makes the law more predictable. If the law seeks to match general moral standards in society this may make it easier for citizens to predict what the law is and may make it more 'in tune' with general attitudes within society.⁸¹ We have already mentioned Antony Duff's argument that criminal law should involve a 'moral conversation' with a criminal.⁸² If a conviction for criminal law is to convey censure, as it is commonly argued, does that not imply that the law is involved in recognizing that morality is playing a role in the definition of a crime?

6.3 PRACTICALITY

Although much of the academic debate over criminalization has focused on the controversy surrounding the enforcement of morality, a very important issue is whether or not a law is practically enforceable.⁸³ There is no point rendering conduct criminal, if it is unlikely the police will ever be able to prove it has happened, or only if extensive police resources are employed. As this indicates there may be some conduct which should be criminal but there is no point in making it criminal because there would be no way of proving it. A more interesting argument is that if people are largely complying with the law anyway there may be a good case for not using the criminal law as that will deny people the good of behaving well through their own choice, rather than compulsion by the state.⁸⁴

QUESTIONS

1. In the light of the issues discussed so far, what arguments can be made for or against fox hunting? What about incest? (See Temkin (1991).)
2. William Wilson asks (Wilson 2002: 44): 'How can the state justify censoring and punishing the possession of a few grams of cannabis for one's own use, while possessing a cellar full of wine for the consumption of the diners of Herefordshire risks only the award of the Michelin rosette?' Do you have a good reply for him?

⁷⁷ Devlin (1965).

⁷⁸ See further Wall (2013).

⁷⁹ Hart (1963).

⁸⁰ Peterson (2010); Zaibert (2011).

⁸¹ Goodin (2011).

⁸² Duff (2010).

⁸³ Walker (1987: 148–52).

⁸⁴ Herring and Madden Dempsey (2010).

3. Is the argument 'it is wrong to enforce morality' itself a moral principle which its proponents are seeking to enforce?
4. I suspect that if many people were asked at the end of their lives what had caused them the most harm it would not be those things that concern the criminal law, but issues such as broken relationships, which are not covered by the criminal law. Does this mean that the law needs to rethink its understanding of harm?

For guidance on answering this question, please visit the Online Resource Centre that accompanies this book: www.oxfordtextbooks.co.uk/orc/herringcriminal6e/.

5. Harcourt (1999) discusses attempts in the city of Chicago to prohibit liquor stores. This is not on the basis of the evils of alcohol, but on the harm such stores are said to cause to the atmosphere and ambience of parts of the city. Is this a good reason for criminalization?

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7 CULPABILITY

For a crime, it is normally not enough to show that the offender caused harm to another; it must also be shown that the defendant was blameworthy in harming the other person. In other words it must be shown that the defendant was responsible for the harm.⁸⁵ At a minimum this requires that the defendant was capable of acting differently from the way he or she did.⁸⁶

The traditional way of analysing offences is to divide them up into the harmful act of the accused (the *actus reus*) and the blameworthy state of mind of the accused (the *mens rea*). Even where both the *actus reus* and *mens rea* are present the law provides defences, such as self-defence or duress (e.g. where the defendant commits a crime because he or she has been threatened with death if he or she does not).

In the following extract, Nicola Lacey sets out the standard conceptual framework for analysing offences. She explains that through a range of devices the law seeks to ensure that only blameworthy individuals are punished:

N. Lacey, 'Legal Constructions of Crime' in M. Maguire, R. Morgan, and R. Reiner (eds) *The Oxford Handbook of Criminology* (4th edn, Oxford: OUP, 2007), 185–7

The Conceptual Framework of Criminal Law

Contemporary codes and commentaries on criminal law in both the common and the civilian traditions tend to be organized around a core framework which sets out the general conditions under which liability may be established. This core framework is often known as the 'general part', or 'general principles', of criminal law—in other words, the set of rules and doctrines which apply across the whole terrain of criminal law rather than to specific offences. In the UK, this framework consists of four main elements: capacity, conduct, responsibility, and (absence of) defence.

1. Capacity

Only those who share certain basic cognitive and volitional capacities are regarded as the genuine subjects of criminal law. One might regard defences such as insanity as defining certain kinds of people as simply outwith the system of communication embodied by criminal law. Since law operates in terms of general standards, the line between criminal capacity and criminal incapacity is a relatively crude one from the point of view of other disciplines. For instance, almost every criminal law system exempts from criminal liability people under a certain age, whatever their actual capacities.

2. Conduct

Criminal conviction is founded, secondly, in a certain kind of conduct specified in the offence definition: appropriating another person's property in the case of theft; causing a person's death in the case of homicide; having sexual intercourse with a person without their consent in the case of rape; driving with a certain level of alcohol in one's blood in the case of driving while intoxicated. Though there are exceptions in the UK's criminal law doctrine, it is generally asserted that mere thoughts, being of a certain status rather than doing an act, and, in the

⁸⁵ Honoré (1999).

⁸⁶ Hart (1968).

absence of a specific duty to act, omitting to do something rather than acting positively, are insufficient to found criminal liability.

3. Responsibility/fault

Criminal liability is generally said to depend, thirdly, on the capable subject being in some sense responsible for or at fault in committing the conduct specified in the offence definition: we do not hold people liable, to put it crudely, for accidents. Responsibility or fault conditions generally consist of mental states or attitudes such as intention, recklessness, knowledge, belief, dishonesty, or negligence. To revert to the examples above, the relevant conditions consist in a dishonest intention permanently to deprive in the case of theft; an intention to kill or cause some less serious kind of harm, or gross negligence in relation to these results, in the case of homicide; recklessness as to the victim's lack of consent in the case of rape. The fourth example—driving while intoxicated—provides an exception to what is generally represented as the general principle that a discrete responsibility element must be proven by the prosecution: only the driving and the blood alcohol level need be established by the prosecution. Notwithstanding their 'exceptional' status, however, these offences of so-called 'strict' liability are in fact empirically dominant in English criminal law today. This division between offences of 'strict' liability and offences requiring proof of fault is the way in which the division between the 'quasi-moral' and 'instrumental/regulatory' terrains of criminal law is purportedly mapped on to legal doctrine. However, as the example of driving while intoxicated—an offence which thirty years ago was regarded as a quintessentially regulatory offence, yet which today carries a marked moral stigma—illustrates, this line is in fact far from clear.

4. Defences

Even where a capable subject has committed the relevant conduct with the requisite degree of fault, a range of defences may operate to preclude or mitigate his or her liability. For example, if the defendant has committed a theft while under a threat of violence, she may plead the defence of duress; if a person kills, intentionally, in order to defend himself against an immediate attack, he may plead self-defence; and if she kills under provocation, she may be convicted of a lesser degree of homicide. 'General defences' apply not only to crimes which require proof of responsibility, but also to those of strict liability. Hence, for example, a person who drives while intoxicated because of duress, whether in the form of a threat or in the form of highly compelling circumstances, may be able to escape liability. Defences are often thought to fall into three main groups—*exemptions*, *justifications*, and *excuses*—each relating to the other three components of liability already mentioned. The defence of insanity, for example, arguably operates to recognize that the defendant's *incapacity exempts* him or her from the communications of criminal law; the defence of self-defence may be seen as amounting to a claim that the *conduct* in question was, in the circumstances, *justified* and hence not the sort of *conduct* which criminal law sets out to proscribe; the defence of duress may be viewed as *excusing* the defendant on the basis that the conditions under which she formed the relevant *fault* condition—in cases of duress, this would generally be intention—are such that the usual inference of *responsibility* is blocked. The defences may be seen as fine-tuning, along contextualized and morally sensitive lines, the presumptive inferences of liability produced by the first three elements.

At one level, this conceptual framework is analytic: it simply provides a set of building blocks out of which legislators and lawyers construct criminal liability. On the other hand—as the description of the framework as a set of 'general principles' suggests—it contains an implicit set of assumptions about what makes the imposition of criminal liability legitimate. The ideas,

for example, that there should be no punishment for mere thoughts, or that defendants should not be convicted unless they were in some sense responsible for their conduct, or in circumstances in which some internal incapacity or external circumstance deprived them of a fair opportunity to conform to the law, express a normative view of criminal law not merely as an institutionalized system of coercion but rather as a system which is structured around certain principles of justice or morality. This normative aspect of the 'general part' of criminal law becomes yet clearer in the light of two broad procedural standards which characterize most modern systems. The first of these is *the principle of legality*: criminal law must be announced clearly to citizens in advance of its imposition. Only those who know the law in advance can be seen as having a fair opportunity to conform to it. Principles such as clarity and non-retroactivity are therefore central tenets of the liberal ideal of the rule of law. The second procedural doctrine is the *presumption of innocence*: a crime must be proven by the prosecution (generally the state, and hence far more powerful than the individual defendant) to a very high standard. Criminal law is therefore implicitly justified not only in terms of its role in proscribing, condemning, and, perhaps, reducing conduct which causes or risks a variety of harms, but also in treating its subjects with respect, as moral agents whose conduct must be assessed in terms of attitudes and intentions, and not merely in terms of effects. And underlying this normative framework is a further set of assumptions about the nature of human conduct: about voluntariness, will, agency, capacity as the basis for genuine human personhood and hence responsibility.

The various assumptions underlying the conceptual framework within which criminal liability is constructed should be of great interest to criminological and criminal justice scholars. For they give us insight into the processes of interpretation in the courtroom—one key site in the process of criminalization. They also provide some interesting points of both contrast and similarity when compared with the assumptions on the basis of which other practices within the criminal process are founded. Are the assumptions of responsible subjecthood that constitute the core of criminal law thinking the same as, or even consistent with, those that underpin the development of policing strategy, sentencing decision-making, probation practice, or prison regimes? If not, does it matter? And what does it signify?

Having presented the orthodox position, Nicola Lacey goes on to critically assess the description of the law she has just provided. As her discussion shows, the position is not as straightforward as might at first appear:

N. Lacey, 'Legal Constructions of Crime' in M. Maguire, R. Morgan, and R. Reiner (eds) *The Oxford Handbook of Criminology* (4th edn, Oxford: OUP, 2007), 188–90

'General Principles' of Criminal Law: A Critical Assessment

The need to bring criminal justice and criminal law analyses into relation with one another is therefore clear. However, it is equally clear that criminal justice scholars ought to be wary of taking the 'general principles' of criminal law on lawyers' terms. For the fact is that the 'general principles of criminal law' are honoured in many systems, and certainly in the UK, as much in the breach as in the observance. The preponderance of criminal offences in fact derogates from these principles in some way: by imposing 'strict' liability without fault; by requiring proof of responsibility in relation only to certain components of the offence; or by modifying the prosecution's burden of proof by imposing evidential, or occasionally, legal burdens on the defence.

The fact that a substantial number of these derogations occur in serious offences such as sexual, financial, and drug-related crime suggests that the 'general principles' are as much an ideological as an actual feature of criminal law's operations. In this respect, the criminal justice scholar will gain some enlightenment from the more critical genre of criminal law scholarship which has subjected the 'general principles' of criminal law to a searching examination.

Conventional criminal law scholars, as we have seen, generally provide a brief résumé of the moral/retributive, regulatory/deterrent aspects of criminal justice. They go on to give a terse statement of the competing concerns of fairness and social protection, due process, and crime control which are taken to inform the development and implementation of criminal law in liberal societies. From this point on, they take the idea of 'crimes' as given by acts of law-creation. In this way both political and criminological issues are quietly removed from the legal agenda. In contrast, critical criminal lawyers assume that the power and meaning of criminal laws depend on a more complex set of processes and underlying factors than the mere positing of prohibitory norms to be enforced according to a particular procedure. Most obviously, they assume that the influences of political and economic power permeate not only the statutory construction of crime but also the practice of doctrinal interpretation. Yet their view is not the reductive, instrumental one of Realism or the Chicago School. Rather, critical criminal lawyers argue that judicial practice is shaped by tensions between competing values whose power infuses all social practices, and which cannot be reconciled by either legislative reform or feats of rationalizing interpretation. From this perspective, further links between the legal and social construction of crime appear. For it seems, *a priori*, likely that the evaluative and pragmatic tensions which shape the development of criminal law will also manifest themselves, albeit to different degrees and in different ways, in other criminal justice practices.

The primary aim of early critical criminal law scholarship was to develop an internal or 'immanent' critique of the doctrinal framework within which different areas of law have been taken to be organized. Taking a close interest in the way in which criminal liability is constructed within legal discourse, critical scholars took as their focus the structure of 'general principles' which are usually taken to underpin criminal law in liberal societies. These included not only the liberal ideals about the fair terms under which criminal punishment may be imposed upon an individual agent, which we considered above, but also the aspirations of neutrality, objectivity, and determinacy of legal method which are associated with the rule of law (Norrie 2001). For example, Kelman's work scrutinized the basis of the responsibility/fault doctrine which purports to structure and justify the attribution of criminal responsibility to the free individual via the employment of standards of fault such as intent and recklessness. He showed that fault requirements veer in an unprincipled way between 'subjective' standards, in which attributions of responsibility depend on what the defendant actually intended or contemplated, and 'objective' standards such as negligence, which impute to the defendant the state of mind of the 'reasonable man'. Following from this, Kelman emphasized the fact that criminal law doctrine evinces no consistent commitment to either a free-will or a determinist model of human behaviour.

Furthermore, Kelman and others demonstrated the manipulability and indeterminacy of the generally accepted doctrinal framework according to which criminal liability is constructed in terms of the four elements discussed above: capacity, conduct, responsibility or fault, and absence of defence. For example, the issue of mistake could be conceptualized with equal doctrinal propriety as a matter pertaining to the existence of the conduct or fault elements of a crime, or to the existence of a defence. A person who assaults another person in the mistaken belief that that other person is in the process of committing an assault on a third party could, in other words, be regarded as having a defence (of mistaken self-defence), or

as lacking the conduct (no 'unlawful' act) or (in certain circumstances) fault/responsibility (no relevant intention) elements of a crime. Since these conceptualizations sometimes affect the outcome of the legal analysis, this entails that doctrinal rules are not as determinate as the conventional theory of legal reasoning assumes. Moreover, the outcome of legal reasoning is contingent upon factors such as the time frame within which the alleged offence was set. For example, whether or not a person is regarded as negligent, in the sense of having failed to reach a reasonable standard of care or awareness, may depend on what range of conduct the court is able to examine. What appears an unreasonable lapse judged in itself may look more reasonable if evidence about its history can be admitted. This broadening of the time frame or context is precisely what the defences often effect. Yet the influence of the framing process is not acknowledged within the doctrinal structure, which accordingly fails to regulate judicial interpretation in the way which is generally supposed.

The critical enterprise here is to hold criminal law up to scrutiny in terms of the standards which it professes to instantiate; and in doing so, to reveal that, far from consisting of a clear, determinate set of norms, based on a coherent set of 'general principles', it rather exemplifies a contradictory and conflicting set of approaches which are obscured by the superficial coherence and determinacy of legal reasoning. By scrutinizing carefully the form which criminal legal reasoning takes, it becomes possible to reveal that practice as having important ideological dimensions, rationalizing and legitimating a system which serves a variety of powerful interests by representing criminal law as a technical and apolitical sphere of judgement. An important part of this process is the (re)reading of cases not merely as exercises in formal legal analysis, but also as texts whose rhetorical structure is at least as important as their superficial legal content. In this kind of reading, critical scholars emphasize the significant symbolic aspect of the power of criminal law, along with the implicit yet powerful images of wrongdoing and rightful conduct, normal and abnormal subjects, guilt and innocence which legal discourse draws upon and produces.

7.1 THE SUBJECTIVISM/OBJECTIVISM DEBATE

There has been much debate over whether, when assessing the blameworthiness of a defendant, the law should adopt a subjectivist or objectivist perspective. In short, a subjectivist account argues that criminal liability should be determined by looking inside the mind of the defendant and considering his or her intentions or foresight.⁸⁷ An objectivist account focuses on the behaviour of the defendant and asks whether the defendant acted as a reasonable person would.

In the following extract, Antony Duff describes the key elements of subjectivism and objectivism:

R.A. Duff, 'Subjectivism, Objectivism and Criminal Attempts' in A. Simester and A. Smith (eds) *Harm and Culpability* (Oxford: OUP, 1996), 19–22

It is no doubt sometimes unhelpful to portray controversies about the proper principles of criminal liability as controversies between 'subjectivism' and 'objectivism'. Certainly neither term picks out a single, unitary, position. Furthermore, some disagreements rather concern the scope of the 'subjective' itself: for example, should we analyse recklessness in terms of

⁸⁷ For a powerful recent statement of subjectivism, see Alexander and Kessler Ferzan (2010).

conscious risk-taking or of 'practical indifference', both of which could be portrayed as 'subjective' aspects of the agent's conduct? Nor can we always draw a clear distinction between the 'subjective' and the 'objective'. If we justify an ascription of recklessness by saying that an agent failed to notice some obvious risk because he did not care about it, we are not simply explaining his failure to notice that risk in morally neutral terms: we are, rather, interpreting his conduct in the light of some normative, non-subjective, standard of appropriate care.

In some contexts, however, there does seem to be a clear distinction between 'subjectivist' and 'objectivist' principles of criminal liability, and controversies which embody that distinction. One such context is the law of attempts. . . .

'Subjectivists' and 'objectivists' disagree about the appropriate criteria for action ascriptions. An agent is criminally liable only if an action matching the law's definition of an offence can justly be ascribed to her. But how should we decide what actions can justly be ascribed to an agent; what criteria should determine our ascriptions? Subjectivists insist that the criteria should be 'subjective'; the actions that are to be ascribed to an agent, for which she is to be held liable, must be described in 'subjective' terms. By contrast objectivists argue that what is 'mine' as an agent cannot be defined or delimited in purely 'subjective' terms, but must be described in partly 'objective' terms.

But what are 'subjective', or 'objective', terms or descriptions? We can say that the 'subjective' is a matter of the agent's psychological states: but that is too vague to be helpful. Any more precise account of the 'subjective', however, would have to be an account of the different conceptions of the 'subjective' expressed in *different* forms of subjectivism. The two most familiar contemporary subjectivist theories, the 'choice' and the 'character' accounts of criminal liability, embody different accounts of the 'subjective'. 'Choice' theorists insist that we can properly ascribe to an agent only those actions that he *chose* to perform; any action for which he is to be held liable must be described in terms of his choices. Choice, as constituting the 'subjective', can then be (minimally) defined in terms of intention and belief; I choose to do what I intend to do, or believe myself to be doing. 'Character' theorists, by contrast, hold that we should ground criminal liability in the character traits manifested in the agent's conduct; for them, the 'subjective' consists in those dispositions, attitudes, or motives which constitute legally relevant character traits.

I will focus in this paper on the 'choice' conception of criminal liability, which is the dominant version of subjectivism. Though the objectivist grounding for the law of attempts which I will sketch is opposed to both types of subjectivism, the implications of each type for the law of attempts differ; and the arguments that I will offer against the 'choice' conception are not the same as those that might be offered against the 'character' conception.

The 'choice' version of subjectivism can be defined by Ashworth's 'intent' and 'belief' principles: agents should be held 'criminally liable for what they intended to do, and not according to what actually did or did not occur', and must be 'judged on the basis of what they believed they were doing, not on the basis of actual facts and circumstances which were not known to them at the time'. This does not mean that agents are to be held liable for their intentions and beliefs *rather than* for their actions. The claim is that the *actions* for which agents are to be held liable should be identified in terms of what they intended to do or believed they were doing: agents are liable for their actions *qua* chosen.

A subjectivist might argue, or might avow principles which imply, that the action ascriptions which generate criminal liability should be determined by *purely* subjective criteria: the actions we ascribe to an agent must be described purely in terms of her intentions and beliefs. By contrast, 'objectivists' (as I shall use the notion) do not hold that criminal liability should be based on *purely* objective criteria: that agents' actual intentions or beliefs should be wholly irrelevant to their criminal liability. They deny, rather, that the subjective dimensions of the

agent's conduct are all that matter for criminal liability: its 'objective' aspects may also be crucial. But what are these 'objective' aspects?

They are of two kinds. One consists in what actually occurs or is actually the case: for example, in the fact of whether the shot that I intend should hit, or believe will hit, V actually hits or misses; in the fact of whether the woman on whom I press sexual intercourse, believing her to consent to it, actually consents or not. The other consists in what a 'reasonable' person would believe, or realize: in the fact that what I take to be a person is obviously (i.e. would be immediately seen by any reasonable person to be) a tree; or that the means by which I hope to achieve a criminal goal are obviously (i.e. would be seen by any reasonable person to be) utterly inadequate; or that my action creates an obvious risk of harm which would be recognized by any reasonable persons.

Now in many contexts subjectivist principles play an *exculpatory* role, exempting from criminal liability those who might otherwise be held liable. Thus someone who does not realize that her action might damage another's property should not be convicted of criminal damage—even if her act 'in fact creates an obvious risk' (one that would be obvious to the 'ordinary prudent' person) of such damage: for she has not chosen to risk damaging another's property. A man who honestly believed that the woman with whom he had intercourse consented to it should not be convicted of rape—even if his belief was both mistaken and unreasonable: for he did not choose to have, or to take a risk of having, 'intercourse with a woman who [did] not consent to it'.

In the following passage from a Law Commission Report on manslaughter, the benefits and disadvantages of an objectivist and subjectivist approach are explored:

Law Commission Report No. 237, *Legislating the Criminal Code: Involuntary Manslaughter* (London: HMSO, 1996), paras 4.4–4.23

Orthodox Subjectivist Theory

4 The legal philosophy traditionally applied in mainstream English criminal law and by this Commission is known as 'subjectivist theory'. It rests on the principle that moral guilt, and hence criminal liability, should be imposed only on people who can be said to have *chosen* to behave in a certain way or to cause or risk causing certain consequences. The roots of subjectivism lie in a liberal philosophy that regards individuals as autonomous beings, capable of choice, and each deserving of individual respect. It is called 'subjectivism' because of the significance that it accords to the individual's state of mind at the time of the prohibited conduct.

4.5 Three principles have been identified as inherent in this basis of liability. The first of these is the '*mens rea* principle', which imposes liability only for outcomes which were *intended* or *knowingly risked* by the alleged wrongdoer. The second principle, the 'belief principle', judges a defendant according only to what *she* believed she was doing or risking. Thirdly, according to the 'principle of correspondence', subjectivists insist that the fault element of a crime *correspond* to the conduct element; for example, if the conduct element is 'causing serious injury', the fault element ought to be 'intention or recklessness as to causing serious injury'. This ensures that the defendant is punished only for causing a harm which she *chose* to risk or to bring about.

4.6 Subjectivist philosophy applies widely in the criminal law today. A man cannot be convicted of rape, for example, if he genuinely believed, albeit unreasonably, that his victim

consented to sexual intercourse, because this belief would be incompatible with the intention to have intercourse with a woman *without her consent*, or recklessness as to that possibility, which are the mental states required for rape.

...

Criticisms of the Subjectivist *Mens Rea* Principle: Can Liability Based on Inadvertence ever be Justified?

4.12 Orthodox subjectivist theory, then, requires the defendant to have been, at least, *aware* of the risk of causing the prohibited harm. However, there is a body of criticism, from very distinguished commentators, of the orthodox subjectivist *mens rea* principle. One ground of criticism is that it is based on a simplistic view of what constitutes knowledge or awareness of risk:

... while we do indeed sometimes make our knowledge of what we are doing explicit to ourselves in... silent mental reports, it is absurd to suggest that such knowledge can be actual only if it is made thus explicit. When I drive my car, my driving is guided by my (actual) knowledge of my car and of the context in which I am driving: but my driving is not accompanied by a constant silent monologue in which I tell myself what to do next, what the road conditions are, whether I am driving safely or not, and all the other facts of which I am certainly aware while I am driving. ... The occurrence or the non-occurrence of certain explicit thoughts is irrelevant to whether I am actually aware of what I am doing: my actions can manifest my awareness even if no explicit thoughts about the relevant facts pass through my mind at the time.⁸⁸

4.13 On this view of what constitutes a mental state, the contrast between awareness and lack of awareness of risk is not as stark as in conventional subjectivist accounts, and it is less clear why inadvertence ought not to be classified as *mens rea* in certain circumstances.

4.14 The main argument in favour of criminalizing some forms of inadvertent risk-taking, however, is that in some circumstances a person is *at fault in failing to consider* the consequences that might be caused by her conduct. The example given by R A Duff is that of a bridegroom who misses his wedding because it slipped his mind when he was in the pub. An orthodox subjectivist would point to his lack of intention or awareness, and deem him consequently less culpable. The bride, however, would rightly condemn him, because it is plain from his conduct that he did not care, and this attitude is sufficient to make him blameworthy. Duff argues that this account retains a subjective element, because attitudes are subjective.

4.15 A similar argument was used by Lord Diplock in the famous case on criminal damage, *Caldwell*:

If it had crossed his mind that there was a risk that someone's property might be damaged but because his mind was affected by rage or excitement or confused by drink, he did not appreciate the seriousness of the risk or trusted that good luck would prevent it happening, this state of mind would amount to malice in the restricted meaning placed upon that term by the Court of Appeal; whereas if, for any of these reasons, he did not even trouble to give his mind to the question whether there was any risk of damaging the property, this state of mind would not suffice to make him guilty of an offence under the Malicious Damage Act 1861. *Neither state of mind seems to me to be less blameworthy than the other.* ...⁸⁹

⁸⁸ Duff (1990: 160).

⁸⁹ [1982] AC 341, 352 (emphasis added).

4.16 Professor Hart some years ago attacked the assumption that to allow criminal liability for negligence would be to set aside the requirement of *mens rea* as a precondition of punishment. His argument was that since 'negligence' implies a failure to do what ought to have been done, it is therefore more than inadvertence, it is *culpable* inadvertence:

Only a theory that mental operations like attending to, or thinking about, or examining a situation are somehow 'either there or not there', and so utterly outside our control, can lead to the theory that we are *never* responsible if, like the signalman who forgets to pull the signal, we fail to think or remember. . . .

What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity etc, the moral protest is that it is morally wrong to punish because 'he could not have helped it' or 'he could not have done otherwise' or 'he had no real choice'. But, as we have seen, there is no reason (unless we are to reject the whole business of responsibility and punishment) *always* to make this protest when someone who 'just didn't think' is punished for carelessness. For in some cases at least we may say 'he could have thought about what he was doing' with just as much rational confidence as one can say of any intentional wrongdoing 'he could have done otherwise'.⁹⁰

Professor Ashworth also concedes that negligence may be an appropriate standard for criminal liability where the harm risked was great, the risk obvious and the defendant had the capacity to take the required precautions.

What Makes Inadvertence *Culpable*?

4.17 In all the sources cited in paragraphs 4.12–4.16, the view is taken that it may be justifiable to impose criminal liability for the *unforeseen* consequences of a person's acts, at any rate where the harm risked is great and the actor's failure to advert to this risk is *culpable*, we are persuaded by this reasoning, in the following paragraphs, therefore, we consider the criteria by which *culpable inadvertence* should be judged if it is to attract the sanctions of the criminal law when death results.

4.18 The first criterion of culpability upon which we must insist is that the harm to which the accused failed to advert was at *least foreseeable*, if not strikingly foreseeable or obvious. If the accused is an ordinary person, she cannot be blamed for failing to take notice of a risk if it would not have been apparent to an *average person* in *her position*, because the criminal law cannot require an *exceptional* standard of perception or awareness from her. If the accused held herself out as an expert of some kind, however, a higher standard can be expected from her; if she is a doctor, for example, she will be at fault if she fails to advert to a risk that would have been obvious to the average doctor in her position.

4.19 As a matter of strict principle, the accused ought only to be held liable for causing death if the risk to which she culpably failed to avert was a risk of *death*. In practice, however, there is a very thin line between behaviour that risks serious injury and behaviour that risks death, because it is frequently a matter of chance, depending on such factors as the availability of medical treatment, whether serious injury leads to death. Admittedly it is possible for conduct to involve a risk of serious injury (such as a broken limb) though not a risk of death; but

⁹⁰ Hart (1968: 151–2).

intention to cause serious injury constitutes the *mens rea* of murder although the *actus reus* is the causing of death, and we see no compelling reason to distinguish between murder and manslaughter in this respect. We consider, therefore, that it would not be wrong in principle if a person were to be held responsible for causing death through failing to advert to a clear risk of causing death or serious injury—subject of course to a second criterion, to which we now turn.

4.20 The second criterion of culpability which we consider to be essential is that the accused herself would have been *capable* of perceiving the risk in question, had she directed her mind to it. Since the fault of the accused lies in her failure to consider a risk, she cannot be punished for this failure if the risk in question would never have been apparent to her, no matter how hard she thought about the potential consequences of her conduct. If this criterion is not insisted upon, the accused will, in essence, be punished for being less intelligent, mature or capable than the average person.

...

4.22 ... A person cannot be said to be morally at fault in failing to advert to a risk if she lacked the capacity to do so.

4.23 If the criteria in paragraphs 4.17–4.22 are satisfied, we consider that it is appropriate to impose liability for inadvertently causing harm in cases where the harm risked is *very serious*. Where a person embarks on a course of conduct which inherently involves a risk of causing death or serious injury to another, society is justified in requiring a higher standard of care from her than from someone whose conduct involves a lesser risk or no risk at all. J L Austin made this point graphically when he wrote 'We may plead that we trod on the snail inadvertently: but not on the baby—you ought to look where you're putting your great feet'.⁹¹

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8 THE VICTIM IN CRIMINAL LAW

Until fairly recently criminal lawyers and criminologists have focused on the defendant and assessments of her or his liability.⁹² The victim, in much writing on criminal law, is a shadowy

⁹¹ Austin (1956: 1).

⁹² S. Edwards (2004); Doak (2003).

figure who appears to be an irrelevance. Consider a case of alleged rape where a defendant wrongly but reasonably believed that the victim was consenting. This 'easy' case would be dealt with by the law saying that such a defendant lacks the *mens rea* for rape and so no offence is committed. But that is to look at the question entirely from the defendant's point of view. As for the victim, she was raped in that she was penetrated without her consent. Another aspect of this issue is that the defendant has no defence based on the fact that the crime was partly the 'victim's fault'. It is no defence for a burglar to say that the victim had left their front door unlocked. However, some academics have suggested that there is a case for providing a defence where the victim contributed to the harm done to them by the defendant.⁹³ Such suggestions are highly controversial, although they do highlight the fact that it is easy to paint a picture of the 'bad criminal' and the 'good victim', whereas the truth may be somewhat more complex.

There have been suggestions that victims owe responsibilities. For example, that individuals should be expected to protect themselves from crime. Another is that victims have a responsibility to report crime. In a recent controversial case, a woman who had been raped by her husband but withdrew her complaint out of terror, was convicted of perverting the course of justice.⁹⁴ That seems to have been particularly harsh in the context of that case where the woman was the victim of domestic violence and marital rape.⁹⁵ She needed the protection of the law, not prosecution by it.

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Cancio Meliá, M. (2004) 'Victim Behavior and Offender Liability' *Buffalo Criminal Law Review* 7: 513.

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Hall, M. (2009) *Victims of Crime: Policy and Practice in Criminal Justice* (Cullompton: Willan).

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von Hirsch, A. et al (2003) *Restorative Justice and Criminal Justice* (Oxford: Hart).

9 THE CRIMINAL PROCESS

Statistics on the number of convictions for particular offences are a poor guide to which crimes are actually committed. It is estimated that only 6 per cent of crimes committed result in a conviction.⁹⁶ This is because victims often do not report the crimes to the police, and if they do the offender is rarely caught. Even if the offender is found, the police may still decide not to charge him. If the police decide to charge, then the Crown Prosecution Service (CPS) may decide not to pursue a prosecution.⁹⁷ There have been concerns over how these decisions

⁹³ See Gruber (2004) and Bergelson (2007a). For a rejection of such arguments, see Herring (2013c).

⁹⁴ *R v A* [2012] EWCA Crim 434. ⁹⁵ S. Edwards (2012). ⁹⁶ Bamber (2002).

⁹⁷ See Rogers (2006b) for a discussion of this decision-making process.

not to prosecute are reached. In particular there are concerns that race, sex, and economic background can improperly play a role in the decision.⁹⁸ The CPS, even if it does decide to prosecute, may charge a lesser offence than the one committed. This might be done for various reasons: the CPS might believe that it would be easier, in order to obtain a conviction, to do so; or the defendant might have offered to plead guilty to the lesser charge, but would plead not guilty to the more serious charge;⁹⁹ or charging the lesser offence may mean that the case will be heard before magistrates, rather than the Crown Court, and so be cheaper.¹⁰⁰

A particularly topical issue is assisted suicide. Following the decision of the House of Lords in *R (Purdy) v DPP*¹⁰¹ the CPS was required to produce guidance which set out when they would or would not prosecute cases of assisted suicide.¹⁰² The current position of assisted suicide is somewhat ambiguous. While still technically a crime it is clear that in some cases it will not be prosecuted. John Spencer has queried whether this is consistent with basic democratic principles:

Is it really compatible with the rule of law that, when an Act of Parliament makes a certain form of behaviour a criminal offence, the DPP should in effect decriminalise it, in whole or in part, by saying when it will and will not be prosecuted? The orthodox answer, forcibly expressed by the Court of Appeal in the judgment which the House of Lords reversed, is 'no': once Parliament has created an offence, only Parliament has the authority to redraw its boundaries so that it catches fewer people in its net. For any other organ of the State to attempt to do so is to infringe the first rule of the constitution, which is the supremacy of Parliament.¹⁰³

He goes on to note that in recent times Parliament has been drafting such over-broad laws that some discretion over prosecution must be exercised.

In the following passage, Andrew Ashworth and Lucia Zedner describe ways from which the orthodox approach towards criminal procedure is being departed. Traditionally, for a person to be guilty of a crime they are charged with an offence, there is then a trial at which they are found either guilty or not guilty; if the former, they are then sentenced. The authors start by setting out the reasons used by politicians to explain why this traditional approach is not appropriate for some offences in recent years. They then explain why they think such departures should be opposed.

A. Ashworth and L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21

We will outline five avenues of challenge to the paradigmatic sequence of prosecution-trial-conviction-sentence:

- (a) Not cost-effective: it is argued that, as the cost of trials rises, they are not a cost-effective means of fulfilling their purpose. Jury trials should therefore be reserved for the most

⁹⁸ Ashworth and Horder (2013: ch. 1).

⁹⁹ This is sometimes called 'plea bargaining'.

¹⁰⁰ For an interesting discussion on how the cutbacks in legal aid may affect the advice given by lawyers to their clients on how to plead, see Tata and Stephen (2006).

¹⁰¹ [2009] UKHL 45.

¹⁰² CPS (2010). See Daw and Solomon (2010).

¹⁰³ Spencer (2009: 495). See also Rogers (2011) and Greasley (2010).

serious charges where the defendant pleads not guilty, and even summary trials should be reserved for cases in which a court hearing really is necessary.

- (b) Not preventive: it is argued that bringing a defendant to court, with a view to conviction and sentence, may not have preventive effects and may even be counterproductive. This has been a prominent argument in youth justice, where the experience of being accused in court may reinforce a youth's self-identification with lawbreakers and impose the stigma of conviction. It also appears that for some adult offenders conviction and sentence have no greater preventive effect than a form of diversion. This challenge assumes that the purpose of the criminal law and its processes is preventive, at least to some degree.
- (c) Not necessary: it is argued that court proceedings are unnecessary where the defendant is willing to plead guilty, and that for some lesser forms of offending a court hearing may not need to examine the defendant's fault or may not be necessary at all for minor offences, since almost all defendants are willing to accept some lesser, swifter resolution of the case.
- (d) Not appropriate: it is argued that the criminal trial is not well suited to dealing with ongoing conduct and continual offending, because it focuses on specific charges without examining broader issues and continuing patterns of misconduct.
- (e) Not effective: it is argued that in some cases it may not be possible to have a trial, if the canons of procedural fairness are observed, because witnesses are likely to be in fear or otherwise reluctant, and the charge will therefore have to be dropped. For some kinds of crime, high attrition rates (i.e., a low proportion of detected cases going to trial) suggest that aspects of criminal procedure may have the effect of preventing some defendants from being brought to trial.

[They describe in detail some of the recent innovations in criminal law which impact on the traditional procedures used where a crime is alleged. These include (1) diversion, (2) fixed penalties, (3) summary trials, (4) hybrid civil-criminal processes, (5) strict criminal liability, (6) incentives to plead guilty, (7) preventive orders.]

Conviction of an individual for an offence is the strongest form of condemnation of conduct that the state can muster. Conviction for an offence also opens the possibility of a coercive sentence, ordered by a court within the limits of what legislation permits. To justify the creation of a certain crime is therefore to justify the imposition of the censure of conviction and the imposition of a punishment. It is the special significance and gravity of these consequences, with all their legal and social implications, that supports the argument for safeguards in the shape of the procedural requirements of human rights law—the presumption of innocence, the need for proper notice of the charge, adequate time and facilities for preparing a defence, state-funded legal assistance, the right to confront witnesses, the free assistance of an interpreter, the privilege against self-incrimination and various other rights.

Yet we have shown how the existence of these human rights protections has stimulated the development of alternative channels of control that enable the state to avoid the more onerous procedural requirements that now apply to the criminal process. The panoply of preventive, civil, administrative, and hybrid orders introduced in England and Wales in recent years is to a large extent the consequence of just such an imaginative skirting of the burdens of the Convention.

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- Saunders, A. and Young, R. (2007) 'From Suspect to Trial' in M. Maguire, R. Morgan, and R. Reiner (eds) *The Oxford Handbook of Criminology* (Oxford: OUP).

10 CRIMINAL LAW AND THE HUMAN RIGHTS ACT 1998

10.1 THE SIGNIFICANCE OF THE HUMAN RIGHTS ACT 1998

At many points throughout this book we will consider the potential impact of the Human Rights Act 1998 (HRA) on the interpretation of the offence. This section will not therefore seek to summarize the impact of the Act on English and Welsh criminal law,¹⁰⁴ but will outline how the Act works.¹⁰⁵ The Human Rights Act 1998 is designed to ensure the protection of individuals' rights under the European Convention on Human Rights (ECHR). The HRA protects the rights in the ECHR in two main ways:

(1) Section 3 requires judges to interpret legislation in a way which complies with the ECHR so far as is possible. It states:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

As section 3 makes clear, if the wording of a statute is ambiguous and can be interpreted either in a way which is compliant with the Convention rights or in a way which is not, then the statute should be read so as to be compliant. The key phrase is 'so far as it is possible'. Only time will tell how far the courts will be willing to stretch the meaning of words to comply with the statute. The House of Lords has given some guidance on this by saying that section 3 is to be used to interpret, but not amend, legislation.¹⁰⁶ If the court is unable to interpret a statute in line with the Convention rights, then it must apply the statute as it stands and issue a declaration of incompatibility, as a result of which Parliament should consider whether the legislation needs to be amended.¹⁰⁷

(2) Section 6 requires public authorities to act in a way which is compatible with the Convention rights. Section 6 states:

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—

¹⁰⁴ See Ashworth and Strange (2003); Ashworth (2000b).

¹⁰⁵ For more detail, see Choudhry and Herring (2010: chs 1 and 2).

¹⁰⁶ *Re S; Re W* [2002] 1 FCR 577 (HL), para. 38.

¹⁰⁷ See *Bellinger v Bellinger* [2003] UKHL 21 for an example of a case where a declaration of incompatibility was issued.

- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

Importantly for criminal lawyers, the definition of a public authority includes the police, the CPS, and a court.¹⁰⁸ The significance of section 6 for criminal lawyers is as follows:

- (1) Under sections 3 and 6 of the HRA the court must interpret that offence (if possible) in line with the Convention.¹⁰⁹
- (2) When the CPS is considering whether or not to bring a prosecution, it is bound by section 6 because it is a public body. However, in *R v G*¹¹⁰ a majority of the House of Lords rejected an argument that to charge a defendant with a particular crime amounted to an interference with his human rights.¹¹¹
- (3) If a defendant has been convicted of an offence which infringes the Convention rights (e.g. a statutory offence which could not be interpreted in line with the Convention) then it can be argued that the court should impose only a nominal sentence (e.g. an absolute discharge). To impose a substantial sentence would infringe an individual's Convention rights, which section 6 prohibits.

DEFINITION

It is important to appreciate that the HRA can affect the definition of a criminal offence in two ways:

- (1) a defendant may argue that to convict him or her of a particular offence would infringe his or her Convention rights;
- (2) a victim (or potential victim) may argue that the state has infringed his or her rights by not protecting him or her under the criminal law.¹¹² In *A v UK*¹¹³ the fact that the stepfather could hit his stepson without being liable to punishment under the criminal law infringed the stepson's rights under Article 3. This subsequently led the Court of Appeal in *H*¹¹⁴ to reinterpret the circumstances in which a parent can rely on the defence of reasonable chastisement when facing a charge of assault.

10.2 THE IMPORTANT ARTICLES IN THE EUROPEAN CONVENTION

The following are the most important rights under the ECHR for criminal lawyers:

¹⁰⁸ Human Rights Act 1998, s. 6(3)(a).

¹⁰⁹ Note that s. 3 applies only when the court is interpreting a statutory offence; s. 6 would be relevant if the offence is a common law one.

¹¹⁰ [2008] UKHL 37.

¹¹¹ Followed in *R (E) v DPP* [2011] EWHC 1465 (Admin), but see Malkani (2011).

¹¹² Ashworth (2013: ch. 8); Herring (2013b). ¹¹³ (1998) 27 EHRR 611.

¹¹⁴ [2002] 1 Cr App R 59.

The European Convention on Human Rights

Article 2—Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3—Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5—Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6—Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7—No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8—Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9—Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10—Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11—Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 14—Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

10.3 POTENTIAL CONSEQUENCES OF THE HRA ON THE CRIMINAL LAW

Throughout this book we will mention the potential impact of the HRA on specific offences. But here we will consider some of the general principles of the ECHR which will affect the whole of the criminal law.

Certainty

The state is permitted under the ECHR to create criminal offences which interfere with citizens' Convention rights, such as rights to private and family life (Article 8) and freedom of expression (Article 10), but only if the interferences are in accordance with a 'law'. The European Court of Human Rights (ECtHR) has interpreted 'law' in an interesting way.¹¹⁵ A rule can be a law only if it is defined with sufficient precision to enable the citizen to know how to behave in accordance with the law.¹¹⁶ In the following case the ECtHR held that the power under English law to bind the defendant to keep the peace on the basis that his conduct was *contra bonos mores* ('contrary to the public good') was so imprecise that it did not amount to a law, and therefore was an impermissible infringement of the individual's rights.

Hashman and Harrup v United Kingdom

(Application No. 25594/94) (2000) 30 EHRR 241 (ECtHR)¹¹⁷

The applicants were bound over to keep the peace and to be of good behaviour by a UK court after they had disrupted the Portlough Hunt. They claimed that the finding that they had behaved in a manner *contra bonos mores* and the binding over order interfered with the exercise of their rights under Article 10 in a way which was not 'prescribed by law'.

31. The Court recalls that one of the requirements flowing from the expression 'prescribed by law' is foreseeability. A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. At the same time, whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. (See generally in this connection, *Rekvenyi v. Hungary*: 20 May 1999, para. 34.)

32. The Court further recalls that prior restraint on freedom of expression must call for the most careful scrutiny on its part. (See, in the context of the necessity for a prior restraint, *The Sunday Times v. United Kingdom (No. 2)*, loc. cit., para. 51.)

33. The Court has already considered the issue of 'lawfulness' for the purposes of Article 5 of the Convention of orders to be bound over to keep the peace and be of good behaviour. (In *Steel v. United Kingdom*, loc. cit., paras. 71–77.) In that case, the Court found that the elements of breach of the peace were adequately defined by English law. (ibid., para. 75.)

¹¹⁵ *Silver v UK* (1983) 5 EHRR 347.

¹¹⁶ *Norris v Government of the United States of America* [2008] UKHL 16.

¹¹⁷ (2000) 8 BHRC 104, [2000] Crim LR 185.

...

35. It is a feature of the present case that it concerns an interference with freedom of expression which was not expressed to be a 'sanction', or punishment, for behaviour of a certain type, but rather an order, imposed on the applicants, not to breach the peace or behave *contra bonos mores* in the future. The binding-over order in the present case thus had purely prospective effect. It did not require a finding that here had been a breach of the peace. The case is thus different from the case of *Steel*, in which the proceedings brought against the first and second applicants were in respect of breaches of the peace which were later found to have been committed.

36. The Court must consider the question of whether behaviour *contra bonos mores* is adequately defined for the purposes of Article 10(2) of the Convention.

37. The Court first recalls that in its *Steel* judgment, it noted that the expression 'to be of good behaviour' was particularly imprecise and offered little guidance to the person bound over as to the type of conduct which would amount to a breach of the order (para. 76). Those considerations apply equally in the present case, where the applicants were not charged with any criminal offence, and were found not to have breached the peace.

38. The Court next notes that conduct *contra bonos mores* is defined as behaviour which is 'wrong rather than right in the judgment of the majority of contemporary fellow citizens' (para. 13). It cannot agree with the Government that this definition has the same objective element as conduct 'likely to cause annoyance', which was at issue in the case of *Chorherr* (para. 29). The Court considers that the question of whether conduct is 'likely to cause annoyance' is a question which goes to the very heart of the nature of the conduct proscribed: it is conduct whose likely consequence is the annoyance of others. Similarly, the definition of breach of the peace given in the case of *Percy v. Director of Public Prosecutions* (para. 11)—that it includes conduct the natural consequences of which would be to provoke others to violence—also describes behaviour by reference to its effects. Conduct which is 'wrong rather than right in the judgment of the majority of contemporary citizens', by contrast, is conduct which is not described at all, but merely expressed to be 'wrong' in the opinion of a majority of citizens.

39. Nor can the Court agree that the Government's other examples of behaviour which is defined by reference to the standards expected by the majority of contemporary opinion are similar to conduct *contra bonos mores* as in each case cited by the Government, the example given is but one element of a more comprehensive definition of the proscribed behaviour.

40. With specific reference to the facts of the present case, the Court does not accept that it must have been evident to the applicants what they were being ordered not to do for the period of their binding over. Whilst in the case of *Steel* the applicants had been found to have breached the peace, and the Court found that it was apparent that the bind over related to similar behaviour, the present applicants did not breach the peace, and given the lack of precision referred to above, it cannot be said that what they were being bound over not to do must have been apparent to them.

41. The Court thus finds that the order by which the applicants were bound over to keep the peace and not to behave *contra bonos mores* did not comply with the requirement of Article 10(2) of the Convention that it be 'prescribed by law'.

...

43. It follows that there has been a violation of Article 10 of the Convention.

Violation of Article 10 found.

It should not be thought that a court will readily find that an offence is too vaguely defined to constitute law and hence potentially infringe the European Convention. In *Steel v UK*¹¹⁸ it was held that the English offence of breach of the peace (defined as ‘when an individual causes harm to persons or property or acts in a manner the natural consequences of which would be to provoke others to violence’) was sufficiently precise to amount to ‘law’. In *Tagg*¹¹⁹ the Court of Appeal rejected an argument that the offence of being drunk on an aircraft¹²⁰ was insufficiently precise to amount to a law.

One of the reasons why law must not be too vague is that otherwise it will, in effect, be judges or juries, rather than Parliament, which decide what is criminal. In *Jones*¹²¹ Lord Bingham emphasized that

an important democratic principle in this country [is] that it is for those representing the people of the country in Parliament, not the executive and not judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties.

Burden of proof

Most members of the public know that under English and Welsh criminal law a person should be presumed innocent unless proved guilty.¹²² Lord Sankey LC in *Woolmington v DPP*¹²³ declared that ‘throughout the web of the English criminal law one golden thread is always to be seen—that it is the duty of the prosecution to prove the prisoner’s guilt’. The principle is justified on the basis that the consequences of a conviction and punishment are so severe that the state prefers to run the risk of acquitting people who may in fact have committed the offence than convicting people who are in fact innocent. The principle also reflects the fact that the prosecution will have all the resources and power of the state on its side, while the defendant will usually have comparatively limited resources.

The reality is that the presumption of innocence is honoured more in the breach than the observance. Even of the more serious offences which are triable in the Crown Court, 40 per cent include some form of departure from the presumption of innocence, according to Andrew Ashworth and Meredith Blake.¹²⁴ Lord Steyn in *Lambert*¹²⁵ found that 219 of the 540 offences then triable in the Crown Court had provisions which required the defendant to prove their innocence. A common way of departing from the presumption is to create strict liability offences (where it is necessary to prove only that the defendant caused a particular result or state of affairs, and it is not necessary to show that the defendant had a particular state of mind or even behaved unreasonably). Many such offences then have a defence of ‘due diligence’ or ‘no intent’ for which the defendant is obliged to produce evidence.

Any departure from the presumption of innocence must now be considered in the light of the HRA. The presumption of innocence is reinforced by Article 6(2) of the ECHR, which declares: ‘Everyone shall be presumed innocent until proved guilty according to the law.’

¹¹⁸ (1999) 28 EHRR 603.

¹¹⁹ [2001] EWCA Crim 1230. See also *Cotter* [2002] Crim LR 824 (CA) where it was held that the offence of perverting the course of justice was sufficiently clear to be compatible with the European Convention.

¹²⁰ Air Navigation (No. 2) Order 1995, SI 1995/1970, art. 57 and the Civil Aviation Act 1982, s. 61.

¹²¹ [2006] UKHL 16, para. 29.

¹²² A leading work on the presumption of innocence is Stumer (2010).

¹²³ [1935] AC 462, 481 (HL).

¹²⁴ Ashworth and Blake (1996).

¹²⁵ [2002] 2 AC 545, 569.

However, perhaps surprisingly, the ECtHR has not interpreted that article as strictly as it might. The Court's approach in *Salabiaku v France*¹²⁶ and *Phillips v UK*¹²⁷ is that presumption of guilt or the placing of the burden of proof on the defendant does not contravene Article 6 if it is confined within 'reasonable limits'. The House of Lords examined the issue in *Kebele*¹²⁸ and held that the key issue was the difference between persuasive and evidential burdens of proof:

- (1) A persuasive burden of proof means that the party must prove the matter at issue.
- (2) An evidential burden of proof means that the party must introduce sufficient evidence to establish the reasonable possibility that a particular issue is true.

For example if D faces a charge of assault and wishes to raise the defence of duress, D has an evidential burden of establishing some evidence to show that he might have been acting under duress. If he or she introduces some evidence to show that that might be true, the prosecution has the persuasive burden of proof of showing beyond reasonable doubt that the defendant was not acting under duress.

The House of Lords in *Kebele*¹²⁹ explained that reverse burdens of proof were more likely to be compatible with Article 6 if they were evidential rather than persuasive burdens. The court will need to consider the relative difficulty of proving the relevant matter for the defendant and the prosecution, and the seriousness of the threat at which the criminal offence is directed. In other words, a persuasive burden will be justifiable only if it involves an issue which is very easy for the defendant to establish (e.g. to prove that he or she has a licence to perform the activity)¹³⁰ or the burden is necessary for the protection of the public. Therefore, in the light of the HRA, section 3, any statutory burden of proof on the defendant would be interpreted to be evidential if at all possible.¹³¹ It will be interpreted as a persuasive burden only if there is a 'pressing necessity'¹³² for there to be a persuasive burden.

The House of Lords has considered the issue in three cases: *Lambert*,¹³³ *Johnstone*,¹³⁴ and *Sheldrake*:

***Sheldrake v Director of Public Prosecutions; Attorney-General's Reference (No. 4 of 2002)* [2005] 1 AC 264**

Two cases concerning burdens of proof were heard by the House of Lords together. In the first Peter Sheldrake was charged with the offence under section 5(1)(b) of the Road Traffic Act 1988 of being in charge of a motor vehicle after having consumed so much alcohol that the proportion of it in his breath exceeded the prescribed limit. He sought to rely on the defence under section 5(2), which cast upon the defendant the legal burden of proving that there was no likelihood of his driving the vehicle while over the limit. He was convicted by the magistrates. He argued before the House of Lords that this burden of proof was not compliant with the presumption of innocence guaranteed by Article 6(2) of the ECHR.

¹²⁶ (1988) 13 EHRR 379. ¹²⁷ [2001] Crim LR 217.

¹²⁸ *R v DPP, ex p Kebele* [1999] 4 All ER 801 (HL). ¹²⁹ *Ibid.*

¹³⁰ cf. *DPP v Barker* [2006] Crim LR 140 and *R v Makuwa* [2006] Crim LR 911.

¹³¹ See *Webster* [2010] EWCA Crim 2819. ¹³² *Lambert* [2001] 3 WLR 206 (HL).

¹³³ [2001] 3 WLR 206 (HL). For criticism, see Beyleveld, Kirkham, and Townend (2002).

¹³⁴ [2003] 1 WLR 1736.

In the *Attorney-General's Reference* case, the defendant was charged with belonging to a proscribed organization contrary to section 11(1) of the Terrorism Act 2000. He sought to rely on the defence in section 11(2) that the organization had not been proscribed at the time when he became a member or professed to be a member of it and that he had not taken part in any of the organization's activities since it had been proscribed. At the trial the Crown conceded that the defence in section 11(2) imposed an evidential, but not legal, burden on the defendant. The Attorney General referred to the Court of Appeal the question of whether the defence in section 11(2) imposed a legal or evidential burden on the defendant and if a legal one, then whether it was compatible with Article 6(2).

Lord Bingham of Cornhill

[Having reviewed the relevant case law from the ECtHR, **Lord Bingham** stated:]

21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.

...
30. Both *R v Lambert* [2002] 2 AC 545 and *R v Johnstone* [2003] 1 WLR 1736 are recent decisions of the House, binding on all lower courts for what they decide. Nothing said in *R v Johnstone* suggests an intention to depart from or modify the earlier decision, which should not be treated as superseded or implicitly overruled. Differences of emphasis (and Lord Steyn was not a lone voice in *R v Lambert*) are explicable by the difference in the subject matter of the two cases. Section 5 of the Misuse of Drugs Act 1971 and section 92 of the Trade Marks Act 1994 were directed to serious social and economic problems. But the justifiability and fairness of the respective exoneration provisions had to be judged in the particular context of each case. I have already identified the potential consequence to a section 5 defendant who failed, perhaps narrowly, to make good his section 28 defence. He might be, but fail to prove that he was, entirely ignorant of what he was carrying. By contrast, the offences under section 92 are committed only if the act in question is done by a person 'with a view to gain for himself or another, or with intent to cause loss to another.' Thus these are offences committed (if committed) by dealers, traders, market operators, who could reasonably be expected (as Lord Nicholls pointed out) to exercise some care about the provenance of goods in which they deal. The penalty imposed for breaches of section 92 may be severe (see, for example, *R v Gleeson* [2002] 1 Cr App R (S) 485), but that is because the potential profits of fraudulent trading are often great.

31. The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence. It may none the less be questioned whether (as the Court of Appeal ruled in para 52d) 'the assumption should be that Parliament would not have

made an exception without good reason'. Such an approach may lead the court to give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed on it by section 3.

Sheldrake v Director of Public Prosecutions

...

41. It may not be very profitable to debate whether section 5(2) infringes the presumption of innocence. It may be assumed that it does. Plainly the provision is directed to a legitimate object: the prevention of death, injury and damage caused by unfit drivers. Does the provision meet the tests of acceptability identified in the Strasbourg jurisprudence? In my view, it plainly does. I do not regard the burden placed on the defendant as beyond reasonable limits or in any way arbitrary. It is not objectionable to criminalise a defendant's conduct in these circumstances without requiring a prosecutor to prove criminal intent. The defendant has a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would. I do not think that imposition of a legal burden went beyond what was necessary. If a driver tries and fails to establish a defence under section 5(2), I would not regard the resulting conviction as unfair, as the House held that it might or would be in *R v Lambert* [2002] 2 AC 545. I find no reason to conclude that the conviction of Mr Sheldrake was tainted by any hint of unfairness.

...

44. I would allow the Director's appeal, reinstate the justices' decision and answer the certified question by saying that the burden of proof provision in section 5(2) of the Road Traffic Act 1988 imposes a legal burden on an accused who is charged with an offence contrary to section 5(1)(b) of that Act.

Attorney-General's Reference (No. 4 of 2002)

...

54. In penalising the possession of membership of a proscribed organisation, section 11(1) does, I think, interfere with exercise of the right of free expression guaranteed by article 10 of the Convention. But such interference may be justified if it satisfies various conditions. First, it must be directed to a legitimate end. Such ends include the interests of national security, public safety and the prevention of disorder or crime. Section 11(1) is directed to those ends. Secondly, the interference must be prescribed by law. That requirement is met, despite my present doubt as to the meaning of 'proceed'. Thirdly, it must be necessary in a democratic society and proportionate. The necessity of attacking terrorist organisations is in my view clear. I would incline to hold subsection (1) to be proportionate, for article 10 purposes, whether subsection (2) imposes a legal or an evidential burden. But I agree with Mr Owen that the question does not fall to be considered in the present context, and I would (as he asks) decline to answer this part of the Attorney General's second question.

...

Lord Carswell

79. My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Rodger of Earlsferry. I agree with his reasons and conclusions and wish to add only a few observations of my own.

80. The issue common to these appeals is whether it is unfair to the accused to have to undertake the burden of proving the defence provided for in the governing legislation and, if so, whether the relevant provisions should be 'read down' as an evidential rather than a legal or persuasive burden. My noble and learned friend, Lord Bingham of Cornhill, has reviewed in detail in his opinion the applicable provisions of the European Convention on Human Rights and the decisions of the European Court of Human Rights, together with the domestic decisions which affect the issues before us, and I do not wish to add anything to the discussion of the law set out in his opinion and that of Lord Rodger of Earlsferry. I shall consider in this opinion the application of the law to the two appeals before us, observing only that the objective of article 6 of the Convention is to require a fair trial and that the presumption of innocence contained in article 6(2) is one aspect of that requirement, rather than constituting a free-standing obligation. For that reason, as accepted by the European Court of Human Rights in *Salabiaku v France* 13 EHRR 379, inroads into the obligation of the prosecution to prove beyond reasonable doubt all the matters in issue in a criminal trial may be permissible in certain circumstances. The reversal of the ordinary burden of proof resting upon the prosecution may accordingly be justified in some cases and will not offend against the principle requiring a fair trial. Where the question arises, it has to be determined, first, whether it is fair and reasonable in the achievement of a proper statutory objective for the state to deprive the defendant of the protection normally guaranteed by the presumption of innocence whereby the burden of proof is placed upon the prosecution to prove beyond reasonable doubt all the matters in issue. Secondly, one must determine whether the exception is proportionate, that is to say, whether it goes no further than is reasonably necessary to achieve that objective.

...

[Lord Carswell in considering the *Sheldrake* case stated:]

84. The ultimate risk may be that the defendant may elect to drive the vehicle, but it is not in my view the gravamen of the offence. Being in charge of a vehicle while over the limit is in itself such an anti-social act that Parliament has long since made it an offence. A person who has drunk more than the limit should take steps to put it out of his power to drive. Section 5(2) gives him an escape route, which it is quite easy for him to take in a genuine case, as he is the person best placed to know and establish whether he was likely to drive the vehicle. Conversely, the prosecution might be able readily enough to establish that the defendant was in a position to drive the vehicle if he elected to do so, but it could well be difficult to prove beyond reasonable doubt that there was a likelihood of his driving it.

85. An example may be posed to test these propositions. The owner of a car, who has drunk enough alcohol to take him over the limit, decides to wash the car. He takes his keys with him, which he uses to open the doors to get access to all the surfaces to be washed and to clean the inside. It is indisputable that during this process he is in charge of the vehicle. He may have started off with the sole intention of confining himself to cleaning the car, but the possibility exists that he may change his intention and drive it on some errand, perhaps to fill the tank with petrol. The person who knows best whether there was a real risk of that occurring is the defendant himself. I see nothing unreasonable or disproportionate in requiring him to prove on the balance of probabilities that there was no likelihood of his doing so. He should in my opinion have to do so, by adducing evidence which may be duly tested in court.

Appeal allowed. Order of Divisional Court set aside. Order of Court of Appeal (Criminal Division) affirmed in regard to the first question referred and set aside in regard to the second question referred. Defendant's costs on reference in Court of Appeal and House of Lords out of Central Funds.

In the following extract, Ian Dennis usefully summarizes the current state of the law:

I. Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' (2005) *Criminal Law Review* 901 at 912–17

The first stage of the decision-making process deals with the question whether a statute imposes a burden of any kind on the defendant, and, if so, whether it is a legal or an evidential burden. This question is settled by ordinary principles of statutory construction. These include the effect of s. 101 of the Magistrates Courts Act 1980, as explained and expanded by Edwards and Hunt. If the burden is an evidential one no problem of compatibility with Art.6 arises. If the burden is a legal one, the issue of compatibility must be considered.

The second stage of decision-making requires a court to decide the issue of compatibility according to whether the reverse onus (legal burden) is justified as a proportionate measure in pursuance of a legitimate aim. It is at this stage that the main problems and uncertainties arise. The debate is almost entirely about proportionality, but analysis of the case law shows considerable disagreement and inconsistency about the use of one or more of six relevant factors in determining this question. If no broader principles for applying the relevant factors can be identified, the decisions as to the justifiability of particular reverse onuses will continue to resemble a forensic lottery. A search for principle suggests that issues of moral blameworthiness should be proved by the prosecution. These issues will include, in addition to the relevant prohibited acts, any requisite culpable mental states, any objective fault such as negligence, and the unavailability of any common law defences raised by the defendant. Exceptionally, legal burdens can be placed on defendants to prove formal qualifications to do certain regulated acts, and in cases where the defendant accepts the burden of proof of exculpation by virtue of voluntarily participating in a regulated activity from which he intends to derive benefit. Lord Bingham in *Sheldrake* adopted a further principle that where the scope of an offence is so wide as to include defendants who are not blameworthy a reverse onus on the defendant to prove lack of culpability is disproportionate. Conversely, an onus to prove facts taking the defendant outside the rationale of the offence, meaning the danger with which the prohibited, morally blameworthy, conduct is intended to deal, may be upheld. There are advantages to Lord Bingham's principle, but also significant problems.

If the reverse onus is justified as proportionate to a legitimate aim no further decision is necessary. If it is not justified according to these criteria the third stage of decision-making requires the court to read down the legal burden to an evidential burden if it is possible to do this using s.3 of the HRA. On the basis of *Sheldrake* it seems that it will almost always be possible to do this; it is hard to envisage a case that would not come within the scope of Lord Bingham's reasoning. Accordingly a declaration of incompatibility of a reverse onus will almost never be necessary.

Prosecution policy

In *R v G*¹³⁵ a 15-year-old boy had sexual intercourse with a girl who was aged under 13. The case proceeded on the basis that the act was consensual. As such he could have been prosecuted either for the offence of rape of a 13-year-old (section 5 of the Sexual Offences Act 2003) or the less serious offence of committing a sexual act with a child (section 13). He was

¹³⁵ [2008] UKHL 37.

charged and convicted of rape. He appealed to the House of Lords claiming that the charge infringed his rights under Articles 6 and 8.

All of their Lordships agreed that there was no breach of Article 6. That was because Article 6 was concerned with the fairness of the procedure and could not be used to challenge the substantive law.¹³⁶

Lords Hoffmann and Mance and Baroness Hale held that Article 8 did not cover the decision by a prosecution authority to charge a defendant with one offence rather than the other. Therefore, it did not, in this case, infringe G's rights to prosecute him under section 5 (rape of an under-13-year-old) rather than the lesser offence under section 13. Lords Hope and Carswell disagreed holding that to prosecute G for the section 5 offence was a breach of his Article 8 rights.

The impact of the HRA on particular offences

As already mentioned, at many points throughout this book we will consider the impact of the HRA on particular offences. Here just a couple of examples will be given. As the following examples indicate, although defendants may often seek to raise a defence on the basis of the HRA, rarely have they been successful:

- (1) *Smethurst*:¹³⁷ a defendant charged with the creation of an indecent photograph sought to argue that to convict him of the offence interfered with his right to freedom of expression or right to respect for private life. His argument was rejected.
- (2) *Taylor*:¹³⁸ a Rastafarian defendant unsuccessfully claimed that to convict him of a drugs offence interfered with his right to religious freedom.
- (3) *H*:¹³⁹ the Court of Appeal interpreted the defence of reasonable chastisement in a way which was compatible with the victim's rights under the ECHR.
- (4) *Concannon*:¹⁴⁰ the defendant argued that the law on accessories operated unfairly in the context of murder, and that therefore his right to a fair trial under Article 6 was breached. His argument failed, with the Court of Appeal emphasising that Article 6 concerned the fairness of criminal trials, not the fairness of the law itself.
- (5) *Rimmington*:¹⁴¹ the House of Lords rejected an argument that the offence of causing a public nuisance was too vague to satisfy the requirements of Article 6.
- (6) *Howitt*:¹⁴² the Divisional Court rejected a claim that the bar on smoking in pubs in the Health Act 2006 breached articles of the ECHR.

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¹³⁶ Followed in *R (E) v DPP* [2011] EWHC 1465 (Admin), but see Malkani (2011).

¹³⁷ [2001] Crim LR 657.

¹³⁸ [2001] EWCA Crim 2263.

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¹⁴⁰ [2002] Crim LR 213 (CA).

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11 CRITICAL CRIMINAL LAW

In recent times much attention has been paid to critical analysis of criminal law. Critical analysts claim that the attempts of the judiciary and commentators to paint a picture of a law which is rational and logical have failed and that in fact criminal law is replete with irrationality. This reflects political and social tensions within society.¹⁴³ We have already seen a fine example of critical analysis in Nicola Lacey's analysis of the general principles of criminal law excerpted in Section 7. Might it not be more useful to look at what makes police officers decide to arrest someone or what really influences juries in order to convict or acquit,¹⁴⁴ rather than what the law 'in the books' is?

One of England's leading critical criminal lawyers is Alan Norrie, whose work will be excerpted at various points in this book. Here we will extract an analysis of his work by G.R. Sullivan. He focuses on Norrie's claim that criminal law cannot be just because of its failure to consider the potential impact of social and economic inequalities in society.¹⁴⁵ He challenges Norrie—a challenge he often faces—to suggest an alternative criminal law which would be more just. This is a common criticism of critical scholars; they are brilliant deconstructors, but what is to replace the rubble they have created?

G.R. Sullivan, 'Is Criminal Law Possible?' (2002) 22 *Oxford Journal of Legal Studies* 747 at 750–4

Norrie is right to accord a central place to a concern with the nature of the justice or injustice that the criminal law engenders. For Norrie, the maintenance of order in a 40/30/30 society

¹⁴³ Norrie (2002).

¹⁴⁴ Thomas (2010) for a fascinating (and rather reassuring) survey of the fairness of juries.

¹⁴⁵ Of particular concern are the racial aspects of crime: see Phillips and Bowling (2002). On the wider issue of the link between crime and social exclusion, see Green (2011); J. Young (2002); and Tadros (2009). Garland (2001) discusses the use of crime as a form of social control.

entails that the criminal law operates in a fundamentally unjust manner, albeit an injustice tempered by a concern with the requirements of (too limited) a model of justice.

Many will agree with Norrie that large inequalities of resources and power are a bad thing and that many civic advantages would flow from establishing a more egalitarian, less materialistic society. The link between social deprivation and the incidence of criminal offending is undeniable. Anyone with the most cursory knowledge of the day to day realities of the criminal justice system will know the questionable nature of many of its decisions and their consequences when assessed in terms of justice and fairness. Norrie argues that if the criminal justice system is to advance the cause of justice for defendants, the grip of the Kantian model must be eased. Norrie does not dismiss as chimeras the Kantian values of autonomy and freedom. He acknowledges that there is a place in moral judgments for responsibility based on personal agency. His argument is that an exclusive stress on personal agency excludes far too much of the whole picture. He emphasizes time and again that conduct is a compound of the social and the personal. Accordingly, the pressures and exigencies of social circumstances and forces should feature in determining criminal liability—a relational account grounded in social reality.

There is considerable force in Norrie's arguments. Yet it is unclear what consequences for the form and content of the criminal law would be entailed by a relational account. He returns frequently to his contention that the principal role of the criminal law is to maintain the status quo for a society profoundly unequal. This perspective would allow claims that at least certain criminal acts are justified forms of defiance and/or appropriate exercises in distributive justice. A functioning legal order could not accept such claims as the basis of exemption from the norms of the criminal law. Thus his argument moves in the direction of displacing the current legal order. Yet Norrie insists he is not bent on a dismissal of legal ordering and legal values. His project is one of reconstruction, albeit radical reconstruction. In keeping with that, he nowhere claims directly that social disadvantage justifies criminal acts. Indeed, he seems to allow that findings of guilt must be made even within the current dispensation. His position seems to be that social factors should constitute grounds of *excuse* and that these excuses currently go unheard because of the Kantian model. Thus we are not dealing with a macro rejection of the right of the institutions of an unjust society to condemn and punish. We are within the realm of the micro examination of the circumstances of individuals, the realm of excuses.

Thus Norrie requires a theory of excuse which accommodates the exculpatory force of certain kinds of social circumstances and pressures. Yet the possibility of such a theory is unexamined by Norrie. The link between the macro unfairness of society and the micro circumstances of individuals is not made. There is merely a pervasive assumption that exculpation would frequently follow *ipso facto* from an holistic appraisal of all the salient circumstances of disadvantaged defendants. Norrie is aware that an holistic appraisal would be very difficult to fit in with any kind of criminal law which aspired to be a rule based system. He seemingly envisages forms of adjudication which reflect systems of popular justice which have emerged from time to time in certain countries, usually in revolutionary or immediate post-revolution times. Norrie's reconstruction is effectively a dismissal of the possibility of a just and principled criminal law for our current form of liberal capitalist society.

Norrie, with his preoccupation with societal forces, gives little if any attention to the psychological determinants of human agency. It is fair to say that he adopts the Standard Social Science Model of human conduct, allowing pre-dominant effect to the formative influence of social structures and cultural norms. As stated, the individual and individual agency are part of Norrie's ontology and yet the mechanics of individual agency are unexplored. He accepts the premise of free will required by the Kantian paradigm, albeit a free will heavily conditioned by social circumstances. Yet the acceptance of free will, in however socially conditioned a form,

makes the accommodation of excuses based on non-exceptional social circumstances very difficult to accommodate.

Undeniably, social deprivation has a vast impact on the range and nature of options available to an agent. But, of course, there is more in the mix than the constriction of resources and legitimate opportunities. Family circumstances, maleness and age clearly correlate with the incidence of offending. And yet the majority of socially disadvantaged males under the age of 25 from single parent households are not consistent offenders. Clearly, the particulars of an individual's psychology and the vagaries of chance and luck are important too. We may be confident that D would not Φ , if he had been placed in different social circumstances, and yet the majority of his contemporaries in similar social and familial circumstances to him do not Φ . Indeed, a focus on the psychological make-up of the individual defendant may open the way for a more destabilizing critique of the foundations of judgments of culpability than the socially orientated account offered by Norrie.

In the past decade, due to developing imaging techniques, remarkable progress has been made into the understanding of the nature of the brain and its processes. It would be foolish to claim that the increase in the scientific understanding of brain processes eliminates the possibility of an empirically grounded account of free-will. Indeed, so complex is the brain and its processes, a full scientific account of human agency and consciousness may never be had. Yet enough information is already to hand to persuade any open minded person that deterministic accounts of human activities, including complex cerebral activities, cannot be refuted by metaphysics alone.

A striking feature arising from what is known of the workings of the brain is the automaticity of the neuro-chemical processes that are triggered by responses to threats and opportunities arising from the agent's environment. These processes may initiate complex behaviours which are non-volitional if volition implies unconditioned, voluntary choice. It becomes entirely plausible to suppose that different agents, otherwise in like cases, might respond to the same threat or opportunity according to their brain-conditioned psychology. This does not deny for one moment the salience of social circumstances in the construction of conduct. Agent E may be in a position either to offer immediate resistance to a threat or to seek legal redress thereafter. Agent D may lack the option of legal redress. Clearly such socially conditioned data will affect the brain's responses. Yet whether D resists the threat (and thereby commits an offence) or succumbs to it will be a product of her brain-conditioned psychology in addition to her social situation. Whether her conduct is to be conceived as a natural product or as arising from a capacity for choice which she can exercise within some haven of reasons sequestered from the natural order is moot. Yet even if we still cling to the latter view, we must at least concede that it is a contingent hypothesis. Unfortunately, for many criminal lawyers and theorists, free-will will continue to be a confidently held article of faith, supplying vitality to the malign Kantian heritage of punishment as a good in itself rather than a regrettable and problematic necessity. By contrast, receptiveness to the possibility that determinism, even in its hardest versions, may be true should encourage rethinking about the whole process of punishment and stimulate the pursuit of more rational, humane forms of social control.

Accordingly, for persons coming from a very different direction than Norrie, a great deal of scepticism may arise about the criminal law as a system of justice. But just or otherwise, the criminal law will remain as a system of control for the indefinite future. Popular sentiment, quite understandably, would still be moved to condemn wrongdoing and wrongdoers whatever the level of acceptance among scientists and theorists that a deterministic account was the most plausible account of human conduct. Indeed popular sentiment may be fortified by moral theories which do not make voluntarism a necessary condition of blame. In any event, whatever the ultimate legitimacy of these forms of popular sentiment and varieties of moral

theory, an atomistic and conflictual society such as our own could not, for Hobbesian reasons, dispense with State coercion and control in respect of anti-social conduct. As a system of control, Norrie conceives the criminal law as predominantly a resource for the powerful to deploy against the excluded. This, it is suggested, is too monolithic a picture.

It is true, that notwithstanding the advent of the Serious Fraud Office and the Financial Services Authority, the criminal law is of very limited effectiveness in punishing property and fraud offences perpetrated by persons in commercial and professional settings. But then the clear-up rates for domestic burglaries are low, in some police authorities appallingly so. The criminal law and its agencies are not necessarily perceived as an alien occupying force even in the most impoverished of neighbourhoods. Not infrequently, the inhabitants of such neighbourhoods seek more effective protection from the criminal law and explore alternatives to police protection where it is ineffectual. Vulnerable classes of victim such as victims of domestic violence, child abuse, racial attack, corporate disregard for safety look to the criminal law to correct imbalances of power. On occasion, protection may not be forthcoming because the provision of protection may be too disruptive of vested interests. Nonetheless some of the greatest upheavals in doctrine arise when protection is extended to a vulnerable victim in circumstances not obviously within the letter of the law.

The criminal law, its agencies, its punitive infrastructure are problematic, overly politicized facets of modern society. If society is too unfair to command the support of the majority of agents subjected to its criminal law, it follows that the norms of the criminal law will be rejected along with other civic obligations. Yet if the calculus is that the civic order of current society is, all things considered, worth preserving, notwithstanding the unfair distribution of goods in that society, the question arises of whether a criminal law can be achieved which combines effectiveness with legitimacy. The fact that any system of criminal law currently conceivable must, perforce, cause significant injustice to least advantaged citizens must be compatible with an all things considered judgment favouring the criminal law's legitimacy. We must face too the real possibility that the criminal law employs a model of human conduct at variance with the facts of the natural order. These are large caveats, perhaps too large to be set aside. If they are conceded however, central to its legitimacy is whether criminal law is a legal domain or merely a particular form of political decision making.

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12 FEMINIST LEGAL THOUGHT

Feminist analysis has proved a powerful influence on the study of criminal law.¹⁴⁶ Much work has been done on highlighting injustices to women within the criminal justice system. Consider, for example, the following indictment of the criminal justice system:

Domestic violence accounts for a quarter of all crime, and yet only 5% of recorded cases of domestic violence end in conviction, less than 20% of rapes and sexual assaults are reported to the police, and less than 6% of rapes result in conviction. There are now over 4,500 women in prison, an increase of 194% in the last ten years. Most women are convicted of non-violent offences, such as shoplifting. One woman out of 12 judges in the House of Lords, five women out of 43 police Chief Constables, 18 women out of 42 Chief Officers of Probation, seven women out of 42 Chief Crown Prosecutors, 31 women out of 138 Prison Governors. There was evidence of sexual harassment and discrimination experienced by women working in the system.¹⁴⁷

It should be noted that of the just over 4,000 women in prison over half are themselves the victims of domestic violence and over a third have suffered sexual abuse.¹⁴⁸ Feminists have expressed concern that too often women who are in an abusive relationship end up being convicted of crimes they are coerced to do by their abusers.¹⁴⁹

It must not be thought that feminism's sole contribution is to point out examples of gender stereotyping amongst the judiciary or lawyers (rape cases are replete with these) or examples of where the law unjustifiably treats men and women differently (coercion may be an example of this in that it is available as a defence for wives but not husbands). As the following extract by Nicola Lacey suggests, there is much more to a feminist perspective than this:

N. Lacey, 'General Principles of Criminal Law? A Feminist View' in D. Nicolson and L. Bibbings (eds) *Feminist Perspectives in Criminal Law* (London: Cavendish, 1996), 92–9

Probably the most *distinctively* feminist objection to the idea of criminal law as based on general principles lies, however, in the claim that generalisations—appeals to universally valid categories or concepts—tend to obscure important differences between persons, actions or situations. From a liberal point of view, for example, the move from the standard of a 'reasonable man' to that of a 'reasonable person' is an advance. But feminists may question whether the abstract person is implicitly understood in terms of characteristics, contexts and capacities more typical of men's than of women's lives and, moreover, is so understood in generalised terms which render exposure of sex/gender issues yet more difficult than in the days of sex-specific language.

This argument comes in more and less radical forms. The more radical version is summed up by Catharine MacKinnon's witty comment that 'I refer: to women and men because you don't see many persons around'. MacKinnon implies that sex/gender is such a fundamental

¹⁴⁶ See Naffine (1997 and 2002) and Wells (2004) for a discussion generally on feminist approaches to law.

¹⁴⁷ Dustin (2004).

¹⁴⁸ Loveless (2010). See further Seal (2010) for a detailed discussion of prejudice shown to female offenders.

¹⁴⁹ Loveless (2010); Herring (2007c).

feature of human identity that the idea of a gender-neutral subjectivity simply makes no sense. This might be taken to mean that the very idea of a standard of 'reasonableness' engages in a totalising discourse, flattening out relevant differences between persons and contexts and brutally assimilating the vast array of human difference to a specific norm. Of course, this is not an *exclusively* feminist argument: it can be (and has been) reproduced around other indices of differentiation, such as ethnicity or class. But it is an argument which has been of sufficient salience in feminist thought to count as one of the distinctive questions posed by feminist scholarship for the general principles.

There are two reasons, however, why this argument fails to generate an entirely convincing critique of the substance of criminal law's general principles. In the first place, the argument proves too much; if it were genuinely persuasive, it would undermine all forms of generalisation, feminist analysis and other forms of critical social theory included. Secondly, a strong form of the argument entails a decisive objection not only to the idea of criminal law as based on general principles, but also to the very idea of criminal law, which is, inevitably, in the business of applying general standards across a range of persons and in a variety of situations. This, of course, does not mean that key political questions about proper respect for relevant differences of history or circumstance do not arise for criminal law. But it does suggest that the implementation of substantive offences and rules of evidence, rather than the general principles, should be the primary object of critical attention. This is because the contextual factors which may be normatively relevant to the application of a general standard to a particular case need to be understood in relation to the types of situation in which they arise.

A less sweeping version of the argument about the capacity of generalisations to obscure important questions of sexual difference has been articulated by Hilary Allen. In a subtle analysis of interpretations of the reasonable person in a series of provocation cases, Allen has revealed the way in which the gender-neutral person is nonetheless fleshed out in judicial discourse in highly (and often stereotypically) sex-specific terms. The construct of the reasonable person cannot entirely conceal the fact that the judges themselves find it difficult to conceive of a legal standard of reasonable behaviour applicable across the sexes. From Allen's point of view, this is highly problematic, because it is inconsistent with the tenet that women are properly accounted full and equal citizens and legal subjects. This does not imply, however, that the different situations of men and women in certain contexts should not be taken into account by criminal law. In relation to provocation, this cashes out in terms of an argument that the level of self-control to be expected should indeed be that attributable to a reasonable legal subject, irrespective of sex, while sexually-specific aspects affecting the gravity of the provocation to a particular woman or man should, like other salient, social differences, indeed be taken into account. Allen's argument implies the more general, prescriptive proposition that criminal law should show sensitivity to inequalities of impact along sexually patterned lines, but that its basic conceptualisation of its subjects should not be sexually differentiated. This argument has something in common with Donald Nicolson's suggestion that the appropriate approach is to ask what it is reasonable to expect of particular defendants in the light of their history, circumstances and so on.

As Allen's argument suggests, another promising ground for feminist analysis lies in the normative aspect of the appeal to general principles. The post-enlightenment vision of responsible human agency which underpins the normative appeal of the general principles is one which was thought valid for women considerably later than for men. Arguably, the gradual recognition of women's agency represents the crowning triumph of feminism's immanent critique of liberalism. Nonetheless, there remains a significant and disturbing difference of degree in the willingness to interpret women's behaviour as the product of psychological or

medical pathology, rather than responsible choice. This point is underscored by Allen's excellent *Justice Unbalanced*, a study which demonstrates sentencing courts' willingness to interpret female offending as the product of mental disorder and a corresponding unwillingness so to interpret male offending.

It is often argued, however, that liberal legal orders conjure up an inappropriately atomistic vision of the social world—a world peopled by competitive individuals whose relations with one another are structured primarily or even exclusively by the pursuit of self-interest. And some feminists have argued that this vision of the social world has particularly baleful implications in marginalizing the relations of care, nurturing and reciprocity which have, as a matter of history, been more central to women's lives than to men's. Interestingly, this is a less salient feature of criminal law than of, say, contract law; criminal law is, after all, in the business of articulating reciprocal responsibilities. One might argue, on the other hand, that the inexorable shift towards subjectivism as the dominant interpretation of the general principles reinforces an individualistic and decontextualised interpretation of human behaviour. By contrast, the reasonableness test, whose allegedly 'objective' nature has been controversial among some feminists, is anything but atomistic. It is, at root, all about a vision of the obligations which human beings owe to one another. Yet again, important feminist questions are likely to arise not merely about the content of these obligations, but also about the kinds of evidence which should be relevant to determining whether they have been breached and about the law's proper response where those obligations have a radically unequal impact on women and men.

...

Sexing the Subject of Criminal Law?

In recent years, feminist criminal law theory has shifted away from questions about how a pre-existing category, 'women', are treated (or ignored) by legal doctrine in favour of questions about legal doctrine's dynamic role in *constituting* women and men as legal and social subjects. This shift was presaged in Cousins' argument that: '[A feminist approach] must analyse how particular legal forms of agency are more or less implicated in the organization of sexual difference and what effect they have on that differentiation.' A good example of this sort of approach is Ngairi Naffine's analysis of the law of rape, which traces a particular and highly sexually differentiated conception of heterosexual relations, even into the 'post-feminist', gender-neutral reconstructed Australian sexual assault provisions. Similarly, one could interpret the critical analysis of the immediacy requirements structuring self-defence and of the loss of self-control model of provocation as contributions to this more recent project.

This sort of argument engages directly with aspects of the general principles of criminal law; it exposes the assumptions which underlie allegedly general concepts, such as consent, belief, foresight or reasonableness and reveals the ways in which they are implicated in the constitution of sexually differentiated social relations. But, crucially, it does so not merely in terms of engagement with the general principles themselves, but rather in terms of the combined effects of a number of much more concrete factors. These include not only widely applied concepts, but also the substance of particular offences; the nature of the time frame and the breadth of the social context defined as relevant by rules of evidence; and the context in which offences are interpreted. Only in relation to this broader set of factors can a specifically feminist analysis of aspects of the general principles be realised. A good example is the well known argument about criminal law's reflection of a dualistic view of human beings as divided between the mental and the material, between mind and body, which is vividly reflected in the

distinction between *actus reus* and *mens rea*. This, along with the understanding of *mens rea* in terms of capacities of reason, understanding and self-control has been argued to have distinctively feminist implications. The strong cultural association of men and the masculine with the mind and with reason, and of women and the feminine with the body and with emotion, inevitably, so the argument goes, constructs women as nonstandard subjects of the rationalist discourse of criminal law.

This is a potentially important insight, but it takes on different complexions according to the context in which it is deployed. It might be argued that the contemporary theoretical emphasis on mental conditions of responsibility—on culpability, rather than harmful conduct—indeed reflects a highly gendered world view, in which the standard model of responsible behaviour is implicitly marked as masculine. Ironically, this might be taken to imply a greater willingness to regard men as potentially criminally responsible and hence to prosecute and punish them. In the context of rape law, the emphasis on the mental linchpin of consent implies something rather different: the doctrinal marginalisation of the embodied aspect of the wrong. At the level of defences based on mental incapacities, it might be expected to lead to a marginalisation of women's full responsibility. These are, of course, questions which are susceptible of empirical research.

In order to interpret the feminist significance of the conceptual building blocks out of which criminal liability is constructed, we therefore have to contextualise those building blocks within the actual offences which they help to create. And, as analysis of the law of rape illustrates, one of the most important issues in tracing criminal law's 'implication in the organisation of sexual difference' will be the relevant rules of evidence, which shape the relevant context and time frame within which the subject is conceptualised. The sexing of criminal law's subjects—indeed, their subjectification—happens in the enactment and interpretation of substantive offences and of the rules of evidence. Though certain aspects of criminal law's normative ideals or conceptual framework may be more often implicated in the construction of sexual difference than are others, their significance varies dramatically across the offences and defences. A dynamic analysis of criminal law's role in maintaining sexual difference is likely to be obstructed, therefore, by the contemporary scholarly practice of placing primary emphasis on the general part.

Finally, it is important to notice that the contours of the general principles, focused as they are on the construction of criminal liability, form an unduly narrow basis for an evaluation of criminal law's sexing of its subjects. For, as feminist analyses of the operation of the law of rape demonstrate, criminal law's constitution of sexed subjects relates not only to defendants, but also to victims and witnesses in the criminal process. To take a doctrinal example, the sexually differentiated position of the incest victim tells us something just as important as the sexually-specific definition of the incest offender's conduct. An adequate feminist analysis of criminal law could never, therefore, confine itself to the conceptual framework or normative underpinnings of liability.

Many feminists have pointed to the obvious, but too easily forgotten, fact that men are responsible for the vast majority of crimes.¹⁵⁰ Men's violence against women and children is often denied or legitimated within society.¹⁵¹ The study of male violence has led to an increase in interest in masculinity and what it is that creates such a strong link between the male identity and the commission of crime.¹⁵² There will, no doubt, be an increasing amount of academic interest in that subject.

¹⁵⁰ Heidensohn (2002).

¹⁵¹ Romito (2008).

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13 PUNISHMENT

Theories of why we punish offenders are crucial to the understanding of criminal law.¹⁵³ Knowing why we punish people can assist us in knowing what offences should be criminal. After all there is little point in finding guilty of offences people who we do not think deserve any kind of punishment.

In fact it is not easy to define punishment.¹⁵⁴ Why do we regard the payment of taxes as not a punishment: is it really different from a fine? Is detention under the Mental Health Act different from imprisonment? There is, not surprisingly, no agreement over what exactly punishment is. It is generally thought to contain some of the following elements.¹⁵⁵

- (1) It must be unpleasant.
- (2) It is inflicted by the state.
- (3) It is imposed on those who have broken the law.
- (4) Its purpose is not to compensate the victim.
- (5) It carries censure of what the defendant did.

The starting point is that punishment is something that requires strong justification.¹⁵⁶ For the state to deprive a citizen of his or her liberty by detaining him or her in prison is a huge invasion of a citizen's basic rights and requires the best of reasons.¹⁵⁷

Theories of punishment can be broken down into those which are consequentialist (that claim that there are good consequences that result from punishment and therefore justify it)

¹⁵³ A very useful collection of readings can be found in von Hirsch and Ashworth (1998).

¹⁵⁴ See Lacey (1988: 7–8) and Hart (1968: 4–5). ¹⁵⁵ See Lacey (1988: 7–8).

¹⁵⁶ J.G. Murphy (1994).

¹⁵⁷ For some discussion on why we punish, see Duff and Garland (1994).

and those which are non-consequentialist (that claim that there are other reasons apart from its consequences which justify punishment). As can be imagined, a whole book could easily be written on the theories of punishment and here the topic can only be covered in outline.¹⁵⁸

13.1 CONSEQUENTIALIST THEORIES OF PUNISHMENT

Consequentialist justifications include the following:

- (1) **Personal deterrence** By punishing the offender he or she will be deterred from committing a crime again.¹⁵⁹
- (2) **General deterrence** By punishing the offender the general public (and particularly those of a criminal bent), on learning of the punishment, will be deterred from committing offences.¹⁶⁰ This may be directly (a person deciding not to commit a crime for fear of the punishment) or indirectly (the law and punishment may affect the moral attitudes of society, which thereby leads to people not taking up crime).¹⁶¹
- (3) **Rehabilitation** The punishment may reform and educate the offender so that he or she does not commit an offence again.¹⁶²
- (4) **Incapacitation** The offender is removed from society (by imprisonment) and so prevented from causing (for a period of time) more harm to society.¹⁶³
- (5) **Restorative justice** There are two main versions of this theory. One focuses on the notion that the response of the criminal law should be analogous to conflict resolution. The criminal law should seek to mediate and mend the broken relationship between the victim and the offender. The other aims to compensate the victim for the wrong done. The link between these themes is that they seek to undo or rectify the harm or some of the harm done by the defendant to the victim.¹⁶⁴

Critics of consequentialist theories claim that they can lead to injustice. They could lead to one offender receiving a far longer sentence than he or she deserved in order to deter others from committing a crime, or to reform the offender him or herself. Imagine that researchers told the Home Secretary that if she announced that every year ten people who had been convicted of theft would be selected at random and have their hands cut off, this would reduce the number of thefts by half. This research would still not justify the cutting off of the hands of the unlucky few involved.

There are also objections that in fact punishment does not achieve the desired aims. For example:

- (1) There is little evidence that imprisonment deters offenders from reoffending.¹⁶⁵
- (2) The evidence that people can be reformed is inconclusive.¹⁶⁶

¹⁵⁸ Often one's views on punishment reflect wider social, political, and even religious views.

¹⁵⁹ Walker (1994).

¹⁶⁰ For a startling example, see *Attorney-General's Reference (No. 4 of 2002)* [2002] Crim LR 333, which suggested sentences of five years for robbery of mobile phones in order to deter others.

¹⁶¹ Edmundson (2002). ¹⁶² Richards (1998).

¹⁶³ N. Morris (1994). One particularly controversial proposal is that those deemed particularly dangerous should be incapacitated for longer than those deemed non-dangerous who commit similar offences (see von Hirsch (1998a and 1998b) and Prins (2003)). For a broader discussion of the issues, see Ashworth, Zedner, and Tomlin (2013).

¹⁶⁴ Christie (1998). ¹⁶⁵ The evidence is discussed in Beylveld (1998).

¹⁶⁶ von Hirsch and Maher (1998).

- (3) There is even evidence that prison may make people more likely to commit offences on their release.¹⁶⁷

These points, however, should not mean that the consequentialist theories must be abandoned. It may be, for example, that better systems of treating prisoners may improve the reformation rates.¹⁶⁸ Or, if conviction rates were higher, it might be that the deterrent effect of punishment would be more effective.

13.2 NON-CONSEQUENTIALIST THEORIES

The most popular non-consequentialist theory is retributive theory.¹⁶⁹ This is that, quite simply,¹⁷⁰ punishment is justified because the offender deserves it.¹⁷¹ It is good in and of itself to punish, regardless of any consequences of the punishment. Through punishment, the law treats people as human beings who are able to make choices and take the consequences of those choices.¹⁷² To some retributivists punishment is linked to a concept of the offender paying his or her dues to society. Having suffered the penalty, the offender can return to society as a fully acceptable member. To others an offender has gained an unfair advantage over law-abiding citizens by breaking the law, and this needs to be removed by imposing the burden of a punishment.¹⁷³ This last theory has difficulties in the context of serious crime. It is uncomfortable saying that a rapist has gained an advantage by raping.

Retributive theories would also indicate that the level of punishment should reflect the amount of punishment the offender deserves. This seems obvious, but it is significant in that it means that a person should not be given a longer sentence than he or she might otherwise receive on the basis that to do so would be for his or her own good, or for society's good. We should therefore not, for example, impose an especially high sentence on people who have stolen a mobile phone in order to discourage others from stealing, or imprison shoplifters just in order to ensure they receive treatment for their drug addiction. In both these cases, we would be imposing a higher sentence than their crimes deserve. Rather, what should be done is to impose a sentence which is proportional to the wrong they have done.¹⁷⁴

Another non-consequentialist theory of punishment is that punishment is an expression of censure (see the extract at *What is a Crime?*, p.2). Punishment expresses the denunciation by society of the kind of conduct done by the offender.¹⁷⁵ This helps to promote social cohesion and channels public outrage, thereby avoiding vigilantism. This theory provides a clear explanation of why taxation is not equivalent to a fine: a fine, but not a tax demand, carries with it condemnation of the actions of the recipient. The difficulty with the censure theory is that it does not explain why it is necessary to impose a punishment in order to do the censuring task.¹⁷⁶ The censure theory is seen by one of its chief proponents as complementary to retributivism:¹⁷⁷

¹⁶⁷ Martinson (1974).

¹⁶⁸ Brody (1998) discusses the effectiveness of various rehabilitative techniques.

¹⁶⁹ Walker (1998).

¹⁷⁰ M. Moore (1987) claims that retributive theories reflect a natural intuition.

¹⁷¹ Kant (1965: 100).

¹⁷² Duff (1998a) emphasizes the importance of seeing punishment as a form of communication between the state and offenders.

¹⁷³ N. Morris (1969).

¹⁷⁴ von Hirsch (1985).

¹⁷⁵ N. Morris (1994).

¹⁷⁶ Feinberg (1994).

¹⁷⁷ *Ibid.*

M. Moore, 'The Moral Worth of Retribution' in A. von Hirsch and A. Ashworth (eds) *Principled Sentencing* (Oxford: Hart, 1998), 153–4

Retributivism is a very straightforward theory of punishment: we are justified in punishing because and only because offenders deserve it. Moral culpability (desert) is in such a view both a sufficient as well as a necessary condition of liability to punitive sanctions. Such justification gives society more than merely a right to punish culpable offenders. It does this, making it not unfair to punish them, but retributivism justifies more than this. For a retributivist, the moral culpability of an offender also gives society the *duty* to punish. Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retributivism is achieved.

[Moore then turns to defend retributivism from two common criticisms:]

1. First and foremost there is the popularly accepted belief that punishment for its own sake does no good. 'By punishing the offender you cannot undo the crime', might be the slogan for this point of view. I mention this view only to put it aside, for it is but a reiteration of the consequentialist idea that only further good consequences achieved by punishment could possibly justify the practice. Unnoticed by those who hold this position is that they abandon such consequentialism when it comes to other areas of morals. It is a sufficient justification not to scapegoat innocent individuals, that they do not deserve to be punished; the injustice of punishing those who did not deserve it seems to stand perfectly well by itself as a justification of our practices, without need for further good consequences we might achieve. Why do we not similarly say that the injustice of the guilty going unpunished can equally stand by itself as a justification for punishment, without need of a showing of further good consequences? It simply is not the case that justification always requires the showing of further good consequences.

Those who oppose retributivism often protest at this point that punishment is a clear harm to the one punished, and the intentional causing of this harm requires some good thereby achieved to justify it; whereas *not* punishing the innocent is not a harm and thus does not stand in need of justification by good consequences. Yet this response simply begs the question against retributivism. Retributivism purports to be a theory of justice, and as such claims that punishing the guilty achieves something good—namely, justice—and that therefore reference to any other good consequences is simply beside the point. One cannot defeat the central retributivist claim—that justice is achieved by punishing the guilty—simply by assuming that it is false.

The question-begging character of this response can be seen by imagining a like response in areas of tort, property, or contract law. Forcing another to pay tort or contract damages, or to forgo use and possession of something, is a clear harm that corrective justice theories of tort, promissory theories of contract, or natural right theories of property are willing to impose on defendants. Suppose no one gains anything of economic significance by certain classes of such impositions—as, for example, in cases where the plaintiff has died without heirs after his cause of action accrued. 'It does no good to force the defendant to pay', interposed as an objection to corrective justice theories of tort, promissory theories of contract, or natural right theories of property simply denies what these theories assert: that something good *is* achieved by imposing liability in such cases—namely, that justice is done.

This 'harm requires justification' objection thus leaves untouched the question of whether the rendering of justice cannot in all such cases be the good that justifies the harm all such theories impose on defendants. I accordingly put aside this initial objection to retributivism, relying as it does either on an unjustifiable discrimination between retributivism and other deontological theories, or upon a blunderbuss assault on deontological theories as such.

2. A second and very popular suspicion about retributive judgments is that they presuppose an indefensible objectivism about morals. Sometimes this objection is put metaphysically: There is no such thing as desert or culpability (Mackie, 1982). More often the point is put as a more cautious epistemological modesty: 'Even if there is such a thing as desert, we can never know who is deserving'. For religious people, this last variation usually contrasts us to God, who alone can know what people truly deserve. We might call this the 'don't play God' objection.

A striking feature of the 'don't play God' objection is how inconsistently it is applied. Let us revert to our use of desert as a limiting condition on punishment: We certainly seem confident both that it is true and that we can know that it is true, that we should not punish the morally innocent because they do not deserve it. Neither metaphysical scepticism nor epistemological modesty gets in our way when we use lack of moral desert as a reason not to punish. Why should it be different when we use the presence of desert as a reason to punish? If we can know when someone does *not* deserve punishment, mustn't we know when someone *does* deserve punishment? Consider the illogic in the following passages from Karl Menninger (1968):

It does not advance a solution to use the word justice. It is a subjective emotional word...The concept is so vague, so distorted in its applications, so hypocritical, and usually so irrelevant that it offers no help in the solution of the crime problem which it exists to combat but results in its exact opposite—injustice, injustice to everybody. (10–11)

Apparently Dr. Karl knows injustice when he sees it, even if justice is a useless concept. Analogously, consider our reliance on moral desert when we allocate initial property entitlements. We think that the person who works hard to produce a novel deserves the right to determine when and under what conditions the novel will be copied for others to read. The novelist's labour gives him or her the moral right. How can we know this—how can it be true—if desert can be judged only by those with godlike omniscience, or worse, does not even exist? Such scepticism about just deserts would throw out a great deal that we will not throw out. To me, this shows that no one really believes that moral desert does not exist or that we could not know it if it did. Something else makes us suspect our retributive judgments than supposed moral scepticism or epistemological modesty.

13.3 MIXED THEORIES

One very influential theory, propounded by Herbert Hart, has sought to mix both consequentialist and non-consequentialist theories together. He relies on a retributivist theory in order to explain who should be punished and a consequentialist theory to explain how people should be punished. In other words only those who deserve punishment should be punished, but the form of punishment can be decided on the basis of the consequentialist aims of deterrence, incapacitation, or reform.

FURTHER READING

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14 SENTENCING

Of course a conviction is not the end of the trial. If there is a conviction, the judge still needs to go on to consider the appropriate sentence to be imposed. In the following extract, Alan Norrie argues that the flexibility in matters of sentencing is in marked contrast to the 'strictness' of the criminal law:

A. Norrie, *Crime, Reason and History* (London: Butterworths, 2001), 199–210

Throughout this book, I have probed a particular conception of the criminal law as a systematic attempt to govern human conduct by rules. That conception is central to the legitimacy of the modern state, and is most clearly presented in the work of doctrinal scholars operating within the liberal tradition where values of the rule of law and of individual justice are presented as central. I have sought to show that these values are essentially flawed. This is because the model of the abstract juridical individual at their heart constantly comes into conflict with the socio-political realities of crime on the one hand and the politics of the judiciary, as an arm of the state, on the other. Because of this double tension in the basic elements, the lines of legal doctrine are constantly disrupted as rules are tugged this way then that according to the tensions upon which they are founded. Nonetheless the substantive doctrine of the criminal law is rule-based, even if the nature of those rules cannot be adequately understood within a liberal, positivist framework. The general principles of the criminal law remain the very 'stuff' of legal analysis, even if the orthodox approach to them can never properly capture the law's working.

However, when we come to the sentencing stage of the criminal process, we find that once we get beyond the conviction of the accused, the rules and principles of the criminal law largely evaporate and the system becomes much more discretionary and less regulated by law. In terms of liberal theory, this is surprising. After all, it is the sentence of the court that deprives the individual of the liberty that the rule of law is supposed to protect and respect at the conviction stage. Indeed, as Lacey's comment at the head of the chapter indicates, without the sentence of the court, the hard edge of delivery of the criminal sanction, none of the paraphernalia of law at the earlier stage would make much sense. Yet now we come to 'the moment of penal truth', much of the legitimating symbolism of the rule of law is largely cast aside.

The situation might be compared to one of those competitions on the back of breakfast cereal packs. The questions posed are so easy that everyone knows that it is the tie-breaker ('Explain in no more than ten words why you like Krispy Korn Flakes') that determines who gets the prize, and this is decided according to the subjective preference of the judges. The questions become no more than a backdrop to the real process of determining the winner. Consequently, the competitor becomes cynical because it turns out that the competition

is not the real basis for deciding who has won, and also because the actual decision is at the judges' discretion. The same might be said for the criminal law. Conviction does qualify the offender for sentencing but, without a proper set of rules to determine the latter, the most important matter is left in the hands, and at the discretion, of the judge. This overstates the issue, for it is not that discretion is complete. Sentencing maxima exist for many offences and minima are now established for some (Crime (Sentences) Act 1997, ss 2–4, consolidated in Powers of Criminal Courts (Sentencing) Act 2000, ss 109–111). Guideline judgments have also been issued by the Court of Appeal, which 'provide judges with a starting point or range of sentences, and indicate the considerations which ought to be taken into account'. However, such judgments 'do not assign weight to the various factors' to be considered and their authority is indicative rather than binding. They 'merely set the general tariff, but judges are free to tailor the sentence to the facts of the particular case' (Taylor, 1993, 130). This leads to 'considerable latitude, some variation and, inevitably, some inconsistency' (Ashworth, 2000a, 31). Judges consider sentencing to consist in 'trying to reconcile a number of totally irreconcilable facts' (Lord Lane), as art rather than science, and therefore as requiring substantial discretion.

Why should this be so? Why is sentencing only loosely regulated by law, prompting Lacey's suggestion that the system is in bad faith with its own premises as evinced at the stage of conviction? Her answer is to point to the disagreements of principle, the tensions between the underlying values, and the lack of consensus about the proper functions of the criminal law which underlie the sentencing stage. What needs to be added to this is the way in which these disagreements and tensions are generated by the limitations of the ideological forms that underlie the liberal conception of criminal law and criminal punishment.

Problems in the sentencing stage are not just the result of a plurality of competing values, but the product of the organic tensions within the liberal model of the punishable, juridical, individual. Enlightenment thought produced an abstract individual who furnished legal discourse with ideas of rationality, intentionality, voluntariness: in short, of responsibility. But this model was never just legal in a narrow sense. It was always at the core of a broader conception of social order and social control which was premised upon a moral, rational, individual response to the existence of criminal punishment. *Homo juridicus* lay at the heart of both legal doctrine and a philosophical plan for social order which involved a particular conception of punishment. Just as our homuncular friend has proved an inherently unsound basis for the rational construction of legal doctrine at the level of the general principles of responsibility, so he has undermined any attempt to rationalise a system of punishment.

The criminal law has traditionally operated with four core ideologies of punishment which began to emerge from the time of the Enlightenment. It is these which provide the main rationales for sentencing decisions in the criminal justice system. They return us at the end of this book to our starting point in the philosophies of retributivism and utilitarianism. It is these theories of punishment which both provide the theoretical backdrop to the sentence of the court and generate the tensions which make the system so difficult to govern by law. These establish the primary ideological bases for sentencing, theories of retribution and deterrence. However, we will see that these theories of punishment also set up, by way of negation and opposition, the space for two other rationales of sentencing, reform (or rehabilitation) and incapacitation, to emerge in the late nineteenth century.

These further ideologies were constituted as a result of the *failure* of the classical ideologies to control the problem of crime, and they took as their basis a critique of the abstract individualism of the classical models. In its place, they substituted a model of human conduct as concretely determined by personal circumstance, and therefore treatable through state intervention. The resulting ideology substituted a model of concrete human individuality

and individualised treatment for the classical model of abstract individualism. In so doing, it injected further competing and conflictual elements into the penal arena, alongside the conflicts already generated within the classical models. Substantial indeterminacy at the sentencing stage is the product of these multiple conflicts emerging from the historically generated, theoretically and practically unrealistic, ideological forms that govern the official understanding of crime, its control and punishment.

In the light of some of the points made in this extract, it is understandable that several commentators¹⁷⁸ have argued that criminal law can only be properly understood by having a secure grasp of not only the definition of criminal offences, but also criminal procedure and the law on sentencing. That would certainly be an ideal, but for students it would mean that criminal law courses would have to last three times as long as they do at present. Also, criminal law textbooks would be even bigger.

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15 CONCLUDING THOUGHTS

This chapter should have demonstrated that the concepts of ‘crime’ and ‘criminal law’ are far less straightforward than might be thought. Indeed it has proved very difficult to even define what a crime is. Academics have been keen to produce fine-sounding theories seeking to restrict the use of criminal law to those circumstances in which it is absolutely necessary and, where it is needed, to ensure the response of the criminal law is proportionate and predictable. It should not be surprising that these theories are honoured far more in the breach than the observance. The criminal law is an easy tool for politicians to use to ‘deal with’ politically troublesome issues and provide an easy way to pander to the tabloid press. The criminal law, therefore, although capable of being presented as reflecting certain key philosophical and political principles, more often reflects the rough and tumble of everyday political life.

¹⁷⁸ e.g. Lacey (2002).